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Judges and Royal Commissions

SHOULD sitting Judges continue to accept appointment to Royal Commissions or other commissions of inquiry? That question has been brought to the fore by the recent resignation of Mr Justice Mahon following the Court of Appeal's decision on the Erebus inquiry. Bearing in mind the recent refusal of Mr Justice Mills to chair the Marginal Lands Board inquiry because of a misguided political attack on his integrity, it was really only a matter of time before the political interests underlying most inquiries forced the issue. It is a question that has no simple answer.

In Australia, generally speaking, Judges will not accept appointment. The position in Victoria was succinctly put as long ago as 1923 (and affirmed subsequently) by Chief Justice Sir William Irvine.

> The duty of His Majesty's Judges is to hear and determine issues of fact and of law arising between the King and the subject, or between subject and subject, presented in a form enabling judgment to be passed upon them, and when passed to be enforced by process of law. There begins and ends the function of the judiciary. It is mainly due to the fact that, in modern times, at least, the Judges in all British Communities have, except in rare cases, confined themselves to this function, that they have attained, and still retain, the confidence of the people. Parliament, supported by a wise public opinion, has jealously guarded the Bench from the danger of being drawn into the region of political controversy. Nor is this salutary tradition confined to matters of an actual or direct political character, but it extends to informal inquiries, which though presenting on their face some features of a judicial character, result in no enforceable judgment, but only in findings of fact which are not conclusive and expressions of opinion which are likely to become the subject of political debate.

On the other hand in England the Salmon Report on Tribunals of Inquiry (which was very much directed towards inquiries into matters causing grave public disquiet) felt the practice of appointing a chairman from the judiciary to be so important it should be given legislative recognition. Emphasis was placed on the public having confidence in the independence, impartiality and integrity of the judiciary as well as on their skills in sifting and assessing evidence and exercising sound judgment. But there are dissentients including Lord Hailsham.

Those supporting judicial appointments underscore the personal qualities — integrity, impartiality, independence — of the Judges and these qualities are not for a moment denied. But in the normal course they are powerfully reinforced by the structure and processes of the judicial system itself. Procedures are defined; rules of evidence govern presentation and the weight to be given to evidence; an appeal structure enables reconsideration; the anonymous jury may shoulder the burden of fact findng; while contempt laws divert critical comment from the person of the Judge to the content of his judgment. As a result grievances are directed not at individual Judges but rather at the judicial system, and when grievances are justified changes can be made and be seen to be made.

These personal qualities are not donned with the robes of judicial office. They are the jealously guarded attributes of any lawyer who takes pride in his profession, and indeed are expected by clients. With judicial appointment, that expectation becomes absolute. Public confidence in the judiciary and the judicial system can rest on nothing less.

Remove the support of the judicial system, as happens when a Judge is appointed to a Royal Commission, and what is left? There remains an absolute expectation that the Judge will exercise his skills with integrity, impartiality and independence. That is why he was appointed. But the support of the judicial system is lost. He is no longer examining ". . . issues of fact . . . presented in a form enabling judgment to be passed upon them . . .". He is now in the area of executive decision-making and must produce the best report on the basis of whatever evidence, however ephemeral, is available — and this report may of necessity consist of no more than the best opinions of a fallible man of integrity.

Lacking the finality of unequivocal evidence such a report will be open to the criticisms of those who would prefer a different conclusion. Where there are several commissioners the burden may be shared; but where a Judge is the sole commissioner he has no escape. The report is his alone; his findings, within the terms of reference, are final; and, on his return to judicial duties, the dignity of his office inhibits re-entry to the fray.

Pronouncements from the Bench are vested with heavy authority. Those expecting Royal Commission reports to be equally authoritative are likely to be disappointed — and wonder at the fallibility of such a high judicial officer. Just as the report is, quite inappropriately, vested with the authority of judicial pronouncement, so any apparent deficiency in a report will follow a Judge back to the bench. This Mr Justice Mahon saw so clearly — and seeing it, the very qualities leading to his appointment as Royal Commissioner left him no option but to resign.

This permanent loss of a highly respected Judge is saddening. But we should also ask whether even the temporary loss of a Judge for the time he is involved with a Royal Commission is acceptable. Few people are suited to be Judges; few are appointed; and their work-load can hardly be described as light. Against this, there are others, including retired Judges and senior members of the legal profession

and civil service who, experience has shown, are perfectly competent to chair commissions of inquiry. Recent illustrations include the inquiries into the Pacific Charger grounding (Sir James Wicks), the Marginal Lands Board Loan Affair (B D Inglis QC) and Open Government (Sir Alan Danks).

In the end it will be for the Judges themselves to decide. Some will no doubt wish to continue the significant contributions made by members of the judiciary sitting as Royal Commissioners. These include the Woodhouse Report on Accident Compensation, the Beattie Commission on the Courts, the McMullin Report on Contraception, Sterilisation and Abortion and the McCarthy Report on the State Services. But events in recent years counsel caution. Examples include the Labour Party criticism of Sir Alfred North following his inquiry into the Moyle affair; an attack from the same source on Mr Justice Mills leading to his refusing to chair the inquiry into the Marginal Lands Board Loan affair; criticism of John Upton by the Prime Minister for the role he took as counsel assisting the Commission in that inquiry; some consider Mr Justice Taylor did little for the dignity of Royal Commissions in his conduct of the A A Thomas inquiry; and over Erebus there is a continual to-ing and fro-ing of comment between the government, Air New Zealand, the Inspector of Air Accidents and Mr Justice Mahon.

A Judge may well be appointed to chair a Royal Commission in the expectation that the authority his office will add to the report will settle the matter. Recent responses to such reports suggest the contrary. Those who wish to pursue their disagreement with a report have first to attack its authority. Where this happens the ensuing imbroglio is no place for a Judge.

Tony Black

FURTHER SCOPE FOR FINANCE COM

By JOHN HUGHES

In this article the author, who is a Lecturer in the Faculty of Law a Canterbury, examines the scope of a recent High Court decisi purchase of motor-cars through finance companies.

The decision of Casey J in *Jones v Loan & Finance Dunedin Ltd* (Dunedin Registry M88/80), which was delivered on 23 February 1981, establishes that the financing by a finance company of the purchase of a car from a private seller by means of a hire purchase agreement is outside the scope of the Hire Purchase and Credit Sales Stabilisation Regulations 1957. This means, of course, that such transactions will not be subject to the maximum loan value and minimum deposit requirements imposed by the Regulations.

The method used by the company in this case was to advertise that it offered loans for cars and to tell those who approached it for a loan that it would only lend on a car bought from a private seller. Once

retail". That part of th the issue whether the a ties was in fact a hire pu obiter, but contains a principles to be applie ments entered into by p regarded as a sham con between them. His H set out in the judgmer *Purchases v Brady* [19 and also relied on pa Turner J and McCarthy J in *Bateman Television Ltd v Coleridge Finance Co Ltd* [1969] NZLR 794, at 813 and 821 respectively. He decided that there was no evidence that the parties did not intend to enter into

"Further scope for Finance Companies"

The article entitled "Further Scope for Finance Companies" at [1981] NZLJ 338 was attributed to John Hughes. It was in fact written by Johanna C Vroegop, a Lecturer in Commercial Law in the Accountancy Department of the Faculty of Commerce, University of Auckland. We regret any embarrassment caused.

"Public identification of an arrested person"

We much regret the mutilation to which the above article on p 33 of the January issue was subjected by a wayward machine after the final proof-reading and editorial checks.

blic Identification of an Arrested Person

In this article the Public Issues Committee of the Auckland trict Law Society recommendsegislation prohibiting the lic identification of an arrested person before he or she ears in Court.*

The Committee wishes to emphasise that, though ointed by the Auckland District Law Society, it is an onomous body and does not purportdto represent the views hat Society or any other body of lawyers.

Salvage on the New Zealand Coast

Piers Davies, Barrister and Solicitor, Auckland

Introduction

IN areas where the sea lanes converge, like the English Channel or Singapore, salvage operations are so frequent and on such a large scale that professional salvage experts have special tugs designed to cope with vessels of any size that get into distress. However, in New Zealand there are no such specialist salvage ships in a permanent state of readiness. The responsibility and burden therefore tends to fall upon the harbour authorities to respond to major casualties on the New Zealand coast.

What is Salvage?

Lloyd's of London defines salvage as:

(a) the act of saving property at sea, and
(b) the award paid to the salvor for services rendered in saving such property.

This definition needs further expansion. "Property" includes the vessel, its equipment, cargo or wreck, but excludes the personal effects of the master or crew or the clothes or personal effects of any passengers, (*Halsbury* (3rd Ed) Vol 35 para 1113.) It also includes an aircraft or its wreck.

Salvage will also apply to saving life at sea if the territorial waters concerned belong to a country which provides this by statute. New Zealand does this by s 356 of the Shipping and Seamen Act 1952.

Key elements of salvage are that —

(a) the vessel is in peril,
(b) the services are voluntary, and
(c) the salvage exercise must be successful.

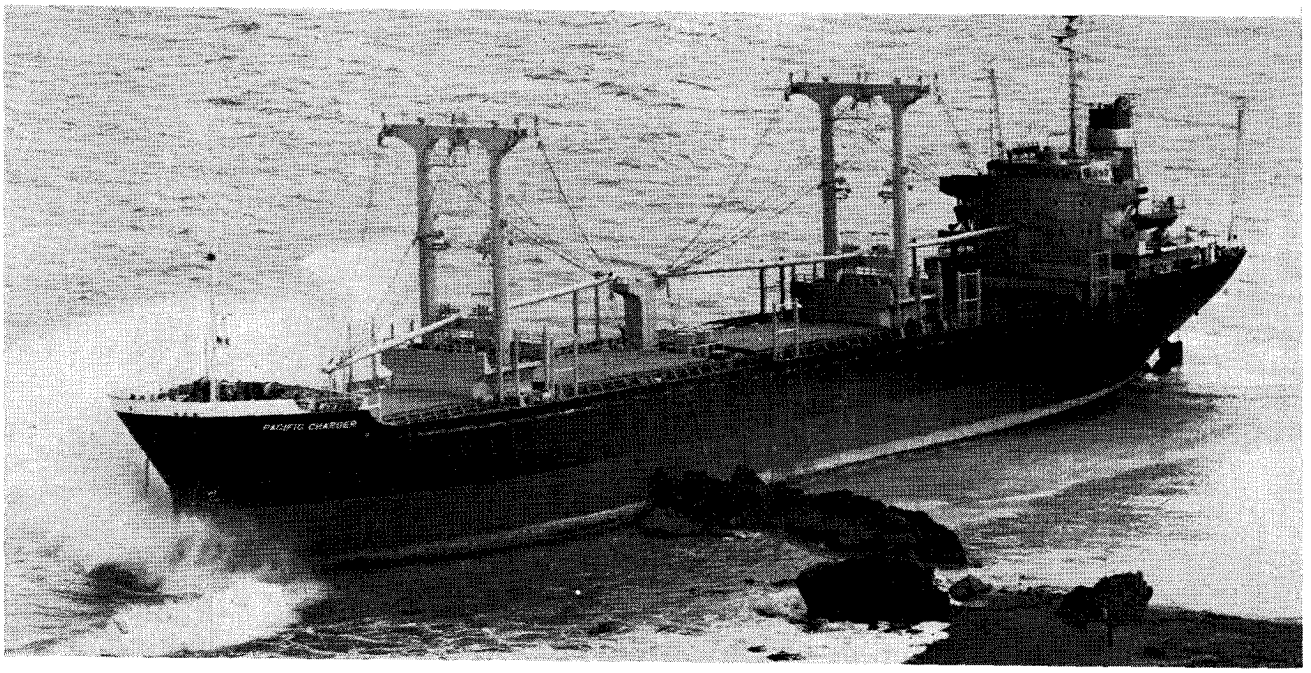
Most commentators also distinguish between pure salvage and contract salvage. Pure salvage is where there is a voluntary act without any verbal or written contract. Contract salvage is where negotiations have been completed between the salvor and the master or owner of the vessel in peril, often by bellowing through a raging gale. Contract salvage outside New Zealand waters is frequently under the terms of the Lloyd's Standard Form of Salvage Agreement, (No Cure — No Pay), known as the Lloyd's Open Form. The latest version, LOF 1980, came into use in July 1980. A copy is set out in [1980] 3 Lloyd's Maritime and Commercial Law Quarterly 304 with a commentary by A F Bessemer Clark at p 297 onwards.

Types of Salvage operations

Although the dramatic occasions when large cargo vessels like the "Capitaine Bougainville" or the "Pacific Charger" have been in distress and salvage services rendered dominate the newspaper reports, the rescue of ocean-going cargo vessels is not an everyday occurrence. Instead, the greatest number of salvage activities on the New Zealand coast relate to much smaller vessels.

(a) *Small pleasure boats*

By far the greatest number of salvage operations in the Auckland and Northland area are of small pleasure craft. At least once each year there is a severe cyclone with resulting bad weather.



V H Young, Wellington

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These cyclones usually arrive during winter, especially May through to August, but they also can arise at other times of the year, like "Cyclone Henry" in February 1979. Although most cyclones are preceded by adequate storm warnings, this is not always the case, like the bad weather during the Round the Island race in 1980.

Consequently the boaties never know the hour nor the day at which bad weather can occur and should regularly inspect their moorings. Instead, every time there is a cyclone, there is also a resulting wake of destruction as small boats break loose and damage themselves or other vessels.

It is a common sight in Auckland on such occasions to see motorists stop in Tamaki Drive and go to the rescue of yachts or launches which are being pounded against the rocks or beaches of the foreshore. The Coast Guard and Police are called out and the marine surveyors have a busy two or three days sorting out the chaos.

Auckland marine surveyors involved in these salvage operations normally charge on a time basis, plus hirage costs for any special equipment required like cranes.

(b) *Larger pleasure boats and coastal fishing vessels*

There are occasions when larger pleasure boats get into difficulty outside the harbour limits; sometimes towage is all that is required. Pleasure craft owners have regularly given skilled assistance to other boats in distress without any thought of financial gain — the customary reward being a crate of beer. However, this custom is beginning to change if the salved boat is insured and valuable.

A similar custom existed for many years over the salvage of fishing vessels by other fishing vessels, but this has largely disappeared and claims for lost fishing time are now the norm.

There have also been a number of occasions when tugs and barges have required salvage services.

If the vessel concerned is substantial or the salvage operation is complex then a true salvage situation is likely to occur, and the salvor will probably only approach it on a "no cure — no pay" basis along the lines of the Lloyd's Open Form. Some organisations, like the Northland Harbour Board, work on the basis of a towage agreement with salvage rights.

(c) *Cargo vessels and ocean-going fishing vessels*

It is in this category of salvage that there is more likelihood of the Lloyd's Open Form being negotiated between the salvor and the master or owner of the vessel concerned.

Although cargo vessels can experience really bad weather conditions off the New Zealand coast, especially when crossing the Tasman during winter, they usually manage to make it to port even after substantial damage, like the "Austral Ensign" in May 1977. However, there is probably at least one major incident each year when substantial salvage assistance is involved. Some of the most famous operations in recent years have included the saving of the crew from the "Union East" and the salvage of the "Capitaine Bougainville", the "Pacific Charger" and the "Trojan Star". Captain McKellar of the Northland Harbour Board has probably had the greatest experience in such salvage, and he and his tug crews have established an enviable reputation for the quality of their operations.

The growth of joint venture fishing operations within the Two Hundred Mile Economic Zone has resulted in a growing number of salvage operations involving ocean-going fishing vessels. These valuable vessels are serviced and operate out of ports in New Zealand and the resulting salvage claims are substantial.

(d) *Wrecks*

Although wrecks are a separate subject all of their own, they can also involve salvage operations. For example, the salvage operations on the wreck of the inter-island ferry "Wahine" continued for several years from 1968. Often the wrecks salved on the New Zealand coast are of considerable historical value and involve complex issues of ownership. The Marine Division of the Ministry of Transport licences any salvage operations, and wrecks that are over 100 years old also come under the jurisdiction of the New Zealand Historic Places Trust.

Calculating Salvage awards

There is no fixed rule as to how a salvage award is to be calculated. It is a matter of discretion for the Court. It is

V H Young, Wellington

dependant upon all the circumstances and the relevant circumstances are now well defined. In general the limit of the amount that will be awarded is a moiety of the value of the salved property, whether the ship salved is derelict or not. There was a general enunciation of how a salvage award is arrived at in "The Industry" (1835) 3 Hag Adm 203:

> The amount of remuneration must depend on all the circumstances. It is not a mere question of work and labour, not a mere calculation of hours, though undoubtedly time is an ingredient; but there are various facts for consideration — the state of the weather, the degree of danger as to the ship and cargo, the risk and peril of the salvors, the time employed, the value of the property; and when all these are considered, there is still another principle — to encourage enterprise, reward exertion, and to be liberal in all that is due to the general interests of commerce, and the general benefit of owners and underwriters, even though the reward may fall upon an individual owner with some severity.

The Courts try to combine liberality to the salvor with justice to the owner of the salved property. *HMS "Thetis"* (1833) 3 Hag Adm 14, PC, at p 62.

The main factors taken into account can be classified as follows:

As regards the salved property

1. The degree of danger to human life.
2. The degree of danger to the property.
3. The value of the property as salved.

As regards the salvors

1. The degree of danger, if any, to human life.
2. The salvors' classification, skill and conduct.
3. The degree of danger, if any, to the property employed in the salvage service and its value.
4. The time occupied, and work done in the performance of the salvage service.
5. Responsibilities incurred in performance of the salvage service, such as risk to the insurance and liability to passengers or freight owners through deviation or delay.
6. Loss or expense incurred in the performance of the salvage service, such as detention, loss of profitable trade, repair of damage caused to ship, boats or gear, and fuel consumed.

The salved value is the difference between the sound value of the vessel prior to the accident and its cost of repair. This same principle can be adapted to salved cargo.

A moiety is usually looked upon as 50% of the salved value, but there have been higher awards, like *"The Bluebird"* [1971] 1 Lloyd's Reports, 229, where £440 was awarded against a salved value of £550. However, the salved vessel was being used for smuggling illegal immigrants into England.

Claims for lost fishing time come within the Dr Lushington's classification and modest claims are now common place. However the traditional disfavour expressed in cases like *"The Fairport"* [1912] p 168 still remains and inflated claims are resisted strongly.

The Lloyd's Open Forms provide for arbitration and the latest LOF 1980 form introduces several new concepts including an enhanced award where the escape of oil from a vessel is prevented, and a "safety net" exception to the No Cure — No Pay principle where the vessel is a laden oil tanker (both in cl 1(a)).

Salvage and towage

Although salvage usually involves towing the salved vessel, salvage and towage are quite separate legal concepts with different consequences. It is therefore important that the contracting parties make sure they have agreed whether it is simply a matter of towage or a salvage operation.

There can also be circumstances where ordinary towing services can change to salvage services during adverse weather conditions. See *"The North Goodwin No 16"* [1980] 1 Lloyd's Reports 71.

Salvor's liens and insurable interest

There is a commonly held belief that the salvor of an abandoned vessel becomes the owner of it. This is not so under New Zealand law: a vessel still belongs to its owner even if all the crew have left it.

If the owner abandons the vessel with the appropriate notices, then it becomes a derelict, but even then, ownership does not pass to the salvor as s 348 of the Shipping and Seamen Act 1952 requires the finder of a wreck to deliver it to the local Receiver of Wreck who then deals with it in accordance with the provisions of that Act.

What the salvor is entitled to is a lien. This lien can either be a maritime lien or a possessory lien, but the Courts have made it clear that they consider the maritime lien is the one to be relied upon by the salvor. In most instances, the salvor will not be worried about exercising this lien, and the unnecessary detention of salved property is viewed by the Courts with disfavour. *"The Glasgow Packet"* (1844) 2 Wm Rob 306.

A salvor has an insurable interest in the salved vessel and should obtain the appropriate insurance cover if he is exercising his lien over the vessel or if it has been seized by the Court under the warrant of arrest procedure in the Admiralty Rules 1975.

Salvors and taxation

Salvage moneys are normally regarded as income for tax purposes, whether the salvors are professional salvors or not. For a detailed commentary on the issues involved see *Naismith v CIR* (1981) 5 NZTC 61,046 which related to salvage moneys earned on the "Capitaine Bougainville".

Receivers of wreck

Part IX of the Shipping and Seamen Act 1952 provides an almost complete code for salvage and wreck procedure. Unfortunately, the sections concerned are so influenced by their origin in British Admiralty law and tradition stretching back beyond the Statute of Westminster in 1275 that Part IX is well overdue for drastic revision. Captain Gerald Pallett has argued in his paper to the Maritime Law Association of Australia and New Zealand in August 1981 that the role of the Receiver of Wreck should be abolished as an anachronism.

The provisions of Part IX have usually been applied only to the larger and more important salvage operations, like the "Capitaine Bougainville".

So far as pleasure craft salvage is concerned, the local Receiver of Wreck usually does not become involved. The practice in the Auckland area is for marine surveyors to notify the Receiver of Wreck in writing when they have salved the boat and are trying to trace the owner. The Receiver notes where the boat is currently held by the marine surveyor but does not usually take it into physical custody as provided for in s 348 of the Shipping and Seamen Act.

Negligence or misconduct on the part of the Salvor

The Courts have always taken a favourable view of salvage services in the belief that it is a matter of public policy that salvage services are offered to vessels in distress. At the same time, the Courts are also aware of another long-standing element of public policy that proper compensation should be made for damage or loss negligently caused.

Halsbury (3rd Ed) Vol 35 para 1143 says "The salvor is required to show the reasonable degree of care, skill and knowledge to be expected in the circumstances from a person in his position". Obviously if the salvor is a professional salvage contractor then a higher degree of care would be expected of him than of a weekend boatie. The Courts will expect professional standards from professional people. *Halsbury* comments in para 1145 over the question of misconduct and negligence that "Where actual loss or damage results from want of requisite care, skill or knowledge or from misconduct, the reward if it is not reduced by the amount of such loss or damage will be diminished by an amount proportionate to the degree of negligence, unskilfulness, ignorance or misconduct proved." *Halsbury* makes it clear that the onus of proof lies on the party alleging the negligence or misconduct and the Courts take due notice of any mitigating circumstances such as a sudden emergency.

The 1979 Cumulative Supplement refers to *Halsbury* (4th Ed) Vol 1 para 327, and says, "The Court takes a lenient view of the conduct of salvors and is slow to find then guilty of negligence, as the policy of the law is to encourage the rendering of salvage services, but it will make such a finding in a proper case". The authority given is "*The St Blane*" [1974] 1 Lloyd's Reports 557. In that case, the Court considered that although some elements of negligence had been involved, the plaintiff had not discharged the burden of proving that the sinking was caused by the negligence of the would-be salvor. Mr Justice Quilliam took a similar approach in 1978 in *Spearman and Miller v Taigel* (AD/94 Wellington) as he gave the salvor the benefit of the doubt. A comparable approach is shown in the Canadian decision, "*The Ogopogo*" [1971] 2 Lloyd's Reports 410.

An example of where the Courts were prepared to penalise the salvor financially was "*The Tojo Maru*" [1971] 1 Lloyd's Reports 341, where the House of Lords found against a professional salvage contractor for the negligence of an employee diver, who fired a bolt through plating into a tank which had not been gas-freed, causing the explosion which substantially damaged the "Tojo Maru". It is significant that there does not appear to have been any particular emergency, the salvor was a professional contractor, and the act of negligence was clear-cut and contrary to orders given.

Consequently, it is necessary to consider all relevant aspects of the salvage services, the nature of the salvor, the type of negligence alleged, and the whole background to the salvage operation, before any particular incident can be properly assessed as to whether it disclosed an effective cause of action against a salvor or would-be salvor.

An article by D R Thomas in [1977] 2 Lloyd's Maritime and Commercial Law Quarterly p 167 comments on the history and present evolution of salvorial negligence and its consequences.

It is to be hoped that the New Zealand Courts will continue to display the reluctance shown in the "*St Blane*" and other cases, especially because of the general absence of professional salvage contractors in New Zealand in the sense that these exist in Europe. It will therefore remain a matter of public interest to encourage the weekend boatie, the Police, and the Navy to assist in salvage operations, and not to deter them.

. . . to encourage the weekend boatie, the Police, and the Navy to assist in salvage operations, and not to deter them.

Future developments in Salvage Law

The "*Tojo Maru*" decision has resulted in the inclusion of salvors in the 1976 International Convention on Limitation of Liability for Maritime Claims. This convention has not yet come into force but the new Lloyd's Open Form (LOF 1980) expressly provides that salvors shall be entitled, as against claims by owners, to the protection of the convention as if it were part of the law of England.

The new Lloyd's Open Form also foreshadows other likely developments in salvage law, as variations on the safety net and enhancement concepts are included in the Draft Convention on Salvage debated at the 1981 Comite Maritime International (CMI) Conference in Montreal.

The need for a thorough revision of the 1910 Salvage Convention became clear during the 1970s because of a number of changes in the pattern of shipping. Ships, particularly tankers, became much larger and more valuable, and new highly specialised cargoes appeared like nuclear waste, liquid natural gas and chemicals. The problems of massive pollution from the wreck of oil tankers resulted in the introduction of legislation which penalised those responsible for the oil pollution. The "Amoco Cadiz" disaster in 1978, which resulted in considerable damage to the beaches of France, highlighted the problems from a salvage point of view.

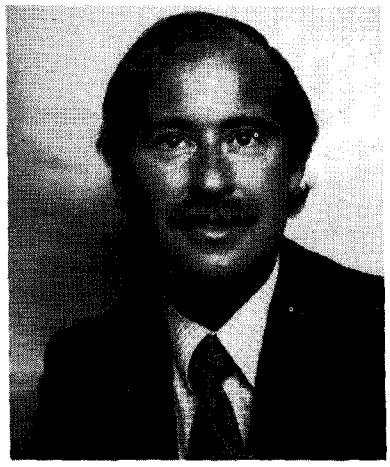
The need for a thorough revision of the 1910 Salvage Convention became clear during the 1970s because of a number of changes in the pattern of shipping.

The new draft convention approved at Montreal is being referred on to the International Maritime Consultative Organisation (IMCO) for submission to a diplomatic conference in due course. It normally takes a number of years for the process to be completed and for a new convention to come into force.

However, the most pressing need in New Zealand is for a review of the Shipping and Seamen Act 1952.

All of these developments mean that the law and practice of salvage in New Zealand are likely to evolve considerably during the 1980s.

Subdivisional problems and the Land Transfer Act



J W H Maslin (LLM (Hons)) District Land Registrar, Nelson

Conveyancers will be aware of the problems created by Part XX of the Local Government Act 1974, "Subdivision and Development of Land", which inter alia was inserted into the principal Act by the Local Government Amendment Act 1978. The author tackles some of the thorniest of these problems; and although — as he points out — the solutions he offers represent the views of but one District Land Registrar, and they would not necessarily be endorsed in every case by the Registrar-General of Land, they should be of some assistance to practitioners and local authorities alike.

1. Background

PART XX of the Local Government Act covering the subdivision and development of land came into force on 1 April 1979. The District Land Registrars throughout New Zealand combined to produce standard Land Registry Office procedures and precedents relevant to the then new legislation which were circulated to territorial local authorities prior to the new Act coming into force. In some cases surveyors in a district were also given copies of the procedures and precedents. These procedures and precedents, although covering most matters arising out of the new Act from a Land Transfer point of view, were not exhaustive because of the sheer complexity of the legislation, and because of the short time District Land Registrars had in which to give a meaning to the wording of legislation that was, in some instances, imprecise and confusing.

When the Local Government Amendment Act 1979 came into force, the District Land Registrars sent to Local Authorities standard precedents relating to the certificates to be given by Council prior to the registration of a common or cross lease. Since then, the New Zealand Law Society has conducted a seminar for lawyers throughout New Zealand on conveyancing problems arising from the new legislation.

Delays in the approval of plans and their subsequent deposit cost the money and time of the Local Authority, the subdivider and his advisers. My experience has been that many solicitors are not involved with subdividing client's proposals until the stage of requisitions from the District Land Registrar for the deposit of the plan. It appears that surveyors have been filling this gap. Even now problems still arise due either to inexperience or to the lack of competent legal advice, either prior to scheme plan preparation or at the time of scheme plan approval by the Local Authority.

I have endeavoured to identify the main areas where problems and delays in having a plan deposited still occur. I have put forward by brief views as to what the law is in relation to these areas. It should be noted that my views are those of one District Land Registrar, and while I consider what follows to be a correct statement of the law, other District Land Registrars are entitled to their own intepretations and rulings.

I gratefully acknowledge the help of my Assistant Land Registrar, Mr S W Haigh and the comments of the District Land Registrar, Auckland, Mr C C Kennelly in compiling this article.

2. Relationship between scheme and survey plan

The survey plan of a subdivision must be in accordance with the approved scheme plan. In other words, the land comprised in the survey plan must correspond with the land in the scheme plan. The reason for this is to protect a Local Authority in respect of its requirements and conditions of approval of a scheme plan. For example, a Council may have approved a scheme plan comprising a large number of sections, and as a condition of approval required the vesting of certain reserves in the Council. The Council may then, incorrectly in my view, approve a survey plan of part only of the land in the scheme plan which part does not relate to that part of the subdivision where land is to vest as reserve. If the subdividing owner failed to proceed with the later stages of the subdivision that involved the vesting of land as reserve, Council's requirement would be frustrated.

It is useful to look at the relationship between a scheme and survey plan in some detail. Section 270 of the Local Government Act 1974 defines a scheme plan as a scheme plan of subdivision and a survey plan as a plan of subdivision in form for deposit under the Land Transfer Act 1952. Accordingly, as a new title order would be applied for in respect of all the land in a title even though part only is shown on the scheme plan, the whole of that title is subdivided.

Section 274(1)(a) of the Local Government Act 1974 provides that Council shall refuse to approve any scheme plan where it is satisfied that *the land on the plan* is not suitable for subdivision. Section 275(1) of the Act provides that ". . . where the owner of any land in the District proposes to subdivide *that land*, a scheme plan of the subdivision shall be . . . submitted to the Council . . ." In that the scheme of Part XX of the Act appears to have Council's powers of action related to allotments, it is probably reasonable to require only allotments to be shown on a scheme plan, even although the balance of a title not shown as an

allotment is being subdivided. The point that must be made clear is that Council's approval at scheme plan stage is in respect of the land in the scheme plan.

The relationship between a scheme and survey plan is brought together by s 305(i) of the Act. Section 305(i) provides "where the council has approved a scheme plan, the owner may submit to the council for its approval, a survey plan . . . and if the council is satisfied that the survey plan is in accordance with the approved scheme plan or with an approved variation thereof the Council shall approve the survey plan". The important point here is that the survey plan must be in accordance with the approved scheme plan. If it is not, Council have no power to approve the survey plan.

I note in passing that if Council's scheme plan approval is ultra vires, as for example, if a building line restriction imposed under an Act other than the Local Government Act 1974 is not dealt with at scheme plan approval stage, Council would have no power to vary the scheme plan approval by purporting to deal with the building line at a later date as, of course, an approval that is a nullity cannot be varied.

District Land Registrars have not since the repeal of the Land Subdivision in Counties Act 1946 been concerned with the relationship between a scheme plan and a survey plan, as a scheme plan would not normally be in front of a District Land Registrar. However, under the Local Government Act 1974, Councils are required to consult a District Land Registrar before imposing an "amalgamation" condition, and the District Land Registrar would normally refer to that consultation, which is in his records, when examining an approved survey plan. If the survey plan and scheme plan differ in substance, the District Land Registrar cannot be satisfied that the necessary consent or approval has been given, and has a duty, imposed by reg 35 of the Land Transfer Regulations 1966, not to deposit the plan.

3. Building line restrictions

If a title is subject to a building line restriction, the surveyor of course should show the restriction on the scheme plan. At the time of scheme plan approval, council must deal with the restriction either by way of imposing the same or another building line restriction or by declaring it to be wholly cancelled. Council must still cancel the restriction if the lot affected is to vest in the Council or Crown as road. The point must be made clear that it is only at the scheme plan approval stage that a Council has any power to impose any condition in accordance with its powers given by s 279. Indeed, provided any conditions imposed at the scheme plan approval stage and required to be complied with before approval of the survey plan are complied with, Council must approve the survey plan — Council has no power to impose additional conditions on its own motion following the scheme plan approval.

4. Road Access

At the time of approval of a scheme plan s 321(1), Local Government Act 1974 provides that every lot must have frontage giving vehicular access to that lot.

Council has power to exempt a lot from this requirement in certain limited circumstances where it is proper to do so. If the lot is intended to be transferred to the owner of the adjoining land, I require a letter from Council to this effect. As a condition of deposit of the plan I will ensure that the Council's intention is given effect to by requiring a transfer of that lot to the adjoining owner. In the case of the other exemptions, Council must pass a resolution at the time of scheme plan approval, which resolution must be lodged, together with an abstract of instruments and the fee for registration. However, a resolution in terms of s 321(3)(e) on the grounds that the site is to be used as the site of a public utility may not be lodged: instead the condition should be set out in a certificate signed by the owner and authenticated by Council, which certificate must be registered.

Where Council makes a resolution in terms of s 321(3)(c) there must either be an exising easement registered against the land affected, or a valid condition under s 279(2)(e) (access lot held in same ownership as lots affected). Council has no power, on a subdivision of lots not having frontage giving vehicular access, to give an exemption by way of a requirement that specified easements which would provide access be granted. In other words easements yet to be created do not enable the Council to apply this clause. Thus, where an allotment does not have frontage which will give vehicular access, Council cannot exempt it from that necessity by requiring the creation of easements which would provide such access.

An appropriate form of resolution where an existing easement runs with the land subdivided would be:

> Pursuant to s 321 Local Government Act 1974 ..... Council, being satisfied that adequate access to lot ..... on Scheme Plan of subdivision of Certificate of Title ..... is provided over Certificate of Title ..... pursuant to an easement of right of way running with the land and appurtenant to Lot ..... hereby resolves that s 321(1) of the Local Government Act 1974 shall not apply.

or, if the second alternative is relied upon where a lot on the plan provides the legal access or part of the legal access to one or more lots:

> Pursuant to s 321 of the Local Government Act 1974 ..... Council, being satisfied that adequate access to lot ..... on scheme plan of subdivision of Certificate of Title ..... is provided over lot ..... on the scheme plan pursuant to a condition imposed under s 279(2)(e) of the Act hereby resolves that s 321(1) of the Act shall not apply.

If the latter resolution is passed, the appropriate condition on the survey plan must by virtue of s 305 be a condition in terms of s 308(7). An appropriate form of resolution in terms of approval of the survey plan would be:

> That lots 6 and 8 hereon (legal access) be held as to five undivided one-fifth shares by the owners of lots 1, 2, 3, 4 and 5 hereon as tenants-in-common in the said shares and that lots 1 to 5 each be amalgamated in one Certificate of Title with each respective one-fifth share.

I have decided as a matter of policy, to give effect to the practicalities of similar type conditions, that I will not require the amalgamation and preceding transfer of all the lots on a plan in a situation like this, provided the subdividing owner makes application for amalgamated titles in respect of each lot and share as tenant-in-common.

Section 321(2) of the Act reads:

> The Council may approve of access to any allotment on foot only, where it considers that vehicular access to the allotment is unnecessary, or because of topographical features is impracticable.

If Council, when considering a scheme plan, approved the plan without vehicular access to a lot, its normal approval would, of course, have to be altered to make it clear its approval was

based on one of the alternatives. It is my view that the allotment must still have frontage to a road and come within this section, but that frontage does not have to give vehicular access to the lot from the road provided there is foot access and one of the stated conditions is met.

5. Compulsory easements

Section 279(2)(i) empowers Council on approval of a scheme plan to approve it subject to a condition that any specified easements shown on the scheme plan be duly granted or reserved. Section 275 of the Act implies that the scheme plan of subdivision may show only the land of the subdivider. The balance of the land in the subdivision would also be a part of the subdivision even if it were not shown as lots on the scheme plan. (See 2 above). The District Land Registrar has a duty to refuse to register any instrument disposing of a lot on a survey plan until he is satisfied the specified easement has been created or will by the registration of the instrument lodged be created. It could be argued that Council has power to require easements only in respect of lots shown on the scheme plan, but the more generous view appears to be that easements may be required not only in respect of the lots on the scheme plan but also in relation to the balance of title of the subdivider after excluding therefrom the lots on the scheme plan. This view can be supported by taking into account the fact that even if only part of a title is shown as a lot on a plan all the land in the title is being subdivided. In addition, an easement could be shown on the scheme plan of the land being subdivided as appurtenant to the other land in the balance of title. Also, although it is the District Land Registrar's duty under s 309(1)(c) to refuse to register a disposition of any lot shown on the plan until the easement is created (and thus the protection he can give is limited to lots on the plan), s 309(1)(a) of the Act widens the noting duties of the Registrar to the relevant certificates of title (be they in respect of lots on the plan or otherwise) when the easement is created. Finally, in support of this more generous view, I note that the practice of District Land Registrars is not to object to such easements beyond the scheme plan if the land affected is being subdivided.

In summary, the Council may not require easements in respect of land in titles beyond those being subdivided and has no power to require easements in respect of land that is not land of the subdividing owner.

Of course, the District Land Registrar's duty only extends to protecting easements affecting lots shown on the survey plan, and if the easement is to affect land in the subdividing owner's title beyond the lots in the survey plan, while the condition imposing the easement may be valid, the easement's creation will not be required by the District Land Registrar. Accordingly, in such cases, it may be appropriate for the Council to ask the owner to voluntarily show that balance land as a lot, to overcome this problem. If the easement is beyond the land in the subdivision the easement may be shown in a schedule and thus be not compulsory. The point is, the easement must not be shown in a memorandum of easements.

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6. Amalgamation conditions

Although each situation is different and must be examined on its own facts, some general brief guidelines can be laid down in respect of consultations in terms of s 279(3) of the Act. Before deciding to approve a scheme plan subject to any conditions specified in paras (a), (b), (c), (d), (e), (j), or (k) or s 279(2) of this Act, Council must consult with the District Land Registrar as to whether or not it is practicable to issue one certificate of title for the purpose of complying with that condition.

When Council wishes to impose a condition in terms of para (a) the lot or adjoining land of the subdividing owner must be contiguous to that of the other owner the land is to be transferred to. However, if the lot or adjoining land is separated from that of the other owner only by a road, railway, drain, water race, river, or stream, the condition may still be imposed. If the lot or land to be transferred is separated by another parcel of land, or say, a river and a road, or two roads, the proposed condition would be beyond Council's power. If the river is not navigable or tidal (in other words, presumptive ownership ad medium filum aquae does apply), the land would not be separated by a river and would therefore be continuous.

If a proposed condition does not come within Council's legal powers, that does not mean the condition is impracticable and that an alternative condition in terms of s 308(2) of the Act may be imposed — what it means is the condition would be ultra vires the Council. Accordingly, if a Council on a consultation were advised not that a proposed condition were impracticable, but instead that the condition were ultra vires the Council, then if a certificate based on the ultra vires condition purportedly imposed in terms of s 308(2) of the Act was presented for registration, it would not be accepted. This point is important as it could determine if a mortgagee's power of sale on default would extend over the other land.

For para (b) to apply the subdividing owner must own both parcels of land. Also the land contiguous, or next to the balance title being subdivided, must be a continuous area of land. The artificial definition of "continuous area of land" in s 270(2) of the Act is for the purpose of dealing with *subdivision* of land, whereas s 279 deals with the converse, ie *amalgamation* of land. For the latter purpose, "continuous" would bear its normal meaning. This means that if the land contiguous to the subdivision is separated by a river or road, for example, in either the balance or adjoining title, the proposed condition is beyond the Council's power. In other words, the continuous area of land must comprise the balance title after excluding therefrom the land in the scheme plan, together with the land in the owner's adjoining title which latter parcel is also continuous.

This point is important as if could determine if a mortgagee's power of sale on default would extend over the other land.

Paragraph (d) applies if both lots to be held in the same certificate of title are shown on the scheme plan.

Paragraph (e) also requires the lots to be held in the same ownership. If there is more than one lot relying on the access lot for legal access the condition should be that the access lot be held by tenancy in common in the same ownership as the lots to which the access lot

provides the legal access.

Paragraph (j) applies only where land that is a physically separated part of the subdividing owner's total land holding cannot be used as a farming unit and is to be used solely or principally for rural purposes. The important points here are first, that for a condition to be valid all the land must be owned by the subdivider, secondly, that the land that cannot be used as a farming unit is physically separated from the total land holding, and, finally, that all parcels of land are to be held in one certificate of title. In other words, if the part is not in the same ownership, this provision does not enable the Council to have it transferred to combine the farming unit.

Paragraph (k) raises similar restrictions to those in para (j) the main point being that the Council cannot require a transfer of the household unit, its power being restricted to requiring the land on which there is erected a household unit to be held in the same certificate of title as the balance land which is used solely or principally for rural purposes.

If a condition is validly imposed by the Council, the District Land Registrar must decide if it is practicable to issue one certificate of title for the purpose of complying with the condition. It seems to me that the only occasions where it would not be practicable to give effect to Council's conditions would be where

If a condition is validly imposed by the Council, the District Land Registrar must decide if it is practicable to issue one certificate of title for the purpose of complying with the condition.

one title was limited as to parcels and the other title was not. Some District Land Registrars consider that it is impracticable to issue one certificate of title where, for example, one piece of land is Crown land, the other held in a renewable lease; where one piece of land is held by an executor, the other held simpliciter; where one piece of land is held by tenancy in common, the other on a joint tenancy, where one piece of land is a Joint Family Home, the other not; or where one piece of land is held in a Unit Title and the other is not. My view, however, is that s 279 of the Act has as its basic intention that the various parcels of land be held in the same ownership and one certificate of title be

My view, however, is that s 279 of the Act has as its basic intention that the various parcels of land be held in the same ownership and one certificate of title be issued therefor.

issued therefor. It is practicable in all but the first and last of the cases above mentioned for the land to be held in the same ownership. It is my opinion that a proposed condition by Council in the above circumstances would not be impracticable although it may require some action be taken by the subdivider. For example, in the tenancy in common situation, the land would have to be transferred to the proprietors so it is held by joint tenancy; in the Joint Family Home situation the additional land would need to be settled, or the existing settlement cancelled. Where some land is Crown land and the other land is held under a renewable lease, it is my view that the situation could not arise in respect of a consultation, as firstly the plan would not be in respect of Land Transfer land so the Registrar would not be involved, and secondly s 279 talks of Certificates of Title and there would be none in respect of the Crown land, and hence any condition would be inappropriate and ultra vires the Council. The Unit Titles situation, like all the above situations, raises real difficulties for which there is no easy answer. Such proposed conditions, would, in my opinion, not be impracticable but contrary to law as there is no authority to issue one certificate of title for titles under the Unit Titles Act 1972 and land held in an ordinary title.

Where the District Land Registrar advises the Council that it is not practicable to issue one certificate of title for the purpose of complying with the condition, the Council shall not impose that condition but may impose a condition specified in s 308(2) of the Act. If this s 308(2) condition is to be imposed, it should of course be imposed at the time of the scheme plan approval. Such a condition can only be imposed if the District Land Registrar advises Council its proposed condition is not practicable — a s 308(2) condition may not be imposed if a condition in terms of s 279(2)(a), (b), (d), (e), (j) and (k) cannot be validly made. Council must set out the condition in a certificate authenticated by the Council and signed by the owner and should register it. An appropriate form of certificate would be:

CERTIFICATE UNDER SECTION 308(3) OF THE LOCAL GOVERNMENT ACT, 1974

IN THE MATTER of a scheme plan of subdivision of Certificate of Title No ..... and pursuant to Section 308(3) of the Local Government Act 1974, the ..... Council hereby certifies that it has by resolution passed on the day of 19.... approved the above plan of subdivision subject to a condition that the registered proprietor of Lot 1 thereon shall not without the consent of the Council transfer or lease such Lot 1 or any part thereof except in conjunction with the land containing ..... hectares being ..... all the land in Certificate of Title No ..... Registry.

THE COMMON SEAL of the ..... Council was affixed hereto in the presence of:

.....
Chairman

.....
Principal Officer

I, ... of ..... the registered proprietor of the land in Certificate of Title No ..... and the above described lands in Certificate of Title ..... HEREBY CONSENT to the registration of this certificate.

DATED this ..... day of ..... 19....

SIGNED by the abovenamed

.....
in the presence of:

Witness:
Address:
Occupation:

The Certificate need not be under seal of the Council and may be authenticated

by the Principal Officer of the Council who should so authenticate the Certificate as Principal Officer.

It is my view that such a condition should not be shown on the survey plan as s 308(1) of the Act makes specific provision for a condition that is practicable under s 279(2)(a), (b), (d), (e), (j) or (k) to be endorsed on the survey plan but makes no such provision for these "impracticable" conditions. Also s 305(3) of the Act requiring the condition to be shown on the survey plan would not apply, as such a condition would be complied with before approval of the survey plan, Council having required the owner to sign the certificate prior to survey plan approval. Finally, the Council has an obligation to set the condition out in a certificate, authenticated and signed by the Council which certificate can be registered. When followed, this procedure is sufficient notice to those affected. Some District Land Registrars permit Council to note on the survey plan that a s 308(2) condition has been imposed, and regard such a notation as a signal. In my view such a notation is not helpful: a Registrar does not know if such a certificate will be registered as registration is not compulsory. It should be noted that such a condition, not being an interest within the meaning of s 137 of the Land Transfer Act 1952, would not support a caveat.

7. Standard of survey

A problem causing delay is where all boundaries shown on a survey plan of subdivision are not marked. Regulation 18 of the Survey Regulations 1972 makes it clear that all boundaries shall be marked at every angle and where necessary at points on the boundary line with pegs, tubes or fence posts as boundary marks. Boundaries of reciprocal or other rights of way in a town survey need only be pegged on the peripheral boundaries. The only exception to pegging of all boundaries on a Land Transfer plan is where the subdivision is to be a natural boundary where offset measurements are sufficient.

Even when a Chief Surveyor has approved a plan as to survey, if the plan is not in accordance with the Survey Regulations then in terms of the proviso to s 167 of the Land Transfer Act 1952 the District Land Registar has no power to deposit a plan not in accordance with the Survey Regulations unless he is of the opinion in the circumstances of the case that a plan complying with the regulations is not warranted.

FAMILY LAW

"The Psychologist and Family breakdown"

This handbook has been prepared by the Department of Education, Psychological Service for the guidance of its members.

IT is designed to acquaint them with the basic procedures under the new law in cases involving children.

The sections of the handbook are divided thus:

(1) The Departmental policy statement on psychological examination of children with separated or divorced parents. In summary it points out that the prime responsibility of the psychologist is that of helping the child and not one parent or the other. It is concerned mainly with the referral and the action taken on that referral.

(2) Guidelines for psychologists working in Family Courts. This deals with the matters of competence and skills, confidentiality, psychological testing and reports, predictions, referrals. On the matter of confidentiality, the guidelines note (3.1) that when a psychologist conducts an assessment for a Court, whatever is discussed may be disclosed to any party in the course of Court proceedings. It is possible that this could lead to problems, for example, by revealing attitudes that could damage relationships already precarious, or the curtailment by the psychologist of free expression of his opinion. A further matter mentioned in the guidelines emphasises the need for follow up work, and the importance of provision by the Courts for this work.

(3) Referral procedures. Separation counselling is first dealt with, concerning referrals by lawyers, cross-referrals from a Marriage Guidance Council and other agencies or individuals. This section then covers contested custody reports separately and the distinction to be made between them by any psychologist acting in any particular matter. The handbook advises against the same psychologist undertaking both separation counselling and a formal assessment of a child for the purposes of a contested custody report.

This section concludes with guidance on such topics as Family Court appearance outside the particular district, private consultancy work, and liaison between the Psychological Service and other agencies and individuals involved in the support work of the Family Court (including the Family Court counselling co-ordinator, or Deputy Registrar and counsel for the child and the Department of Social Welfare).

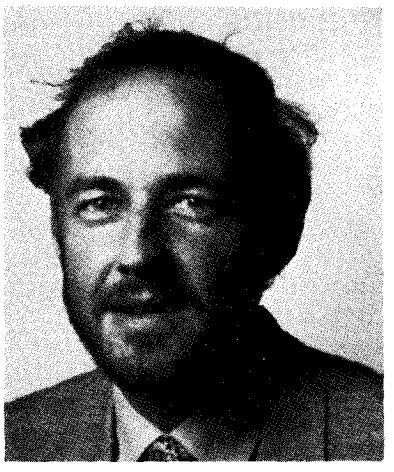
(4) Separation counselling: suggestions and techniques.

(5) Formal assessment and reporting in contested custody cases: techniques.

(6) Bibliography.

Wardship of Court and the Children and Young Persons Act 1974

Iain D Johnston



In this article the author, a Senior Lecturer in Law at the University of Canterbury, discusses the use of the High Court's wardship jurisdiction in the context of the Children and Young Persons Act 1974. The possible exercise of other jurisdiction under the Guardianship Act 1968 in relation to a child who is the subject of a guardianship order under the Children and Young Persons Act is also considered. The author suggests that parents, foster parents, and children should have greater opportunities for seeking independent review of important discretionary decisions by the Director-General of Social Welfare or social workers in relation to children in care.

1. Introduction

Review of discretion

"IT is arguable that whenever a dispute arises between one person and another (whether a private citizen or a welfare authority) over what is to be done with respect to a child, the matter should be capable of judicial resolution."[1] There are aspects of the Children and Young Persons Act 1974 which do not appear to measure up to this ideal but instead confer wide discretions on the Director-General of Social Welfare, District Directors, or social workers without providing for review by a Court of the merits of decisions taken.[2] Thus, for example, where a guardianship order in favour of the Director-General has been made in respect of a child, decisions which fundamentally affect the child's welfare, such as his placement in a particular institution or foster home, where he is to be educated, and what degree of contact he is to have with his parents, are entrusted to the Director-General or social workers with no provision for independent review. The High Court's general administrative jurisdiction is presumably not ousted by such provisions but would not extend to considering the merits of decisions taken, ie whether they were in fact in the best interests of the children concerned.

Under s 5(2)(c) of the Act the Director-General has a duty to "arrange . . . for inquiry into any allegation that any child or young person who is being cared for, whether by the day or intermittently or continuously, away from his parents or guardians is not being properly cared for or is being cared for under conditions that are not suitable for his training or development". Although this is (probably unintentionally) wide enough to cover the case of parental disquiet over treatment of a child who is under the guardianship of the Director-General himself, the contemplated inquiry is not an independent one and is therefore of limited value to parents.

Likewise although a visiting committee appointed under s 70 for any Social Welfare institution has power to "examine the state and condition" of any child therein and communicate with such a child it can, at present, only report its findings to the Director-General himself.

Foster parents might also wish to question official decisions over "their" child eg a decision to allow increased parental access which the foster parents see as unsettling or harmful for the child, or to try a new foster placement, or to terminate the fostering altogether, discharge the guardianship order and return the child to his original family.

Finally, the child himself might object to his placement or treatment at the hands of the Department of Social Welfare.

Guardianship Act

The question arises whether the Guardianship Act 1968 and in particular s 9 dealing with the wardship jurisdiction of the High Court provides a basis for challenging such decisions on their merits.

That judicial supervision is necessary in this context, whether through the wardship jurisdiction or otherwise, has been affirmed in strong terms by Barwick CJ in the High Court of Australia:[3]

> . . . it is to my mind supremely important that there should remain in the Courts the ability in appropriate cases to supervise the actions and the performance of the duties of the public servants to whose care . . . children are committed.

Before the wardship jurisdiction is examined other potentially relevant provisions of the Guardianship Act will be considered: these are ss 11, 12, 14, 15 and 16. Each of these provisions gives the Court power to make orders relating to the guardianship, upbringing, or custody of a child or for access to a child. Each provision is on its face wide enough to apply in respect of a child who is under the guardianship of the Director-General of Social Welfare by virtue of a guardianship order pursuant to the Children and Young Persons Act 1974.[4] Thus, for example, under ss 11(1) and 15(2) the parents of a state

ward might seek respectively custody of him or access to him, while under s 14(1) the ward himself, if aged 16 or more, might try to challenge a decision by the Director-General that affects him "in an important matter" by applying to a Family Court Judge "who may if he thinks it reasonable in all the circumstances to do so, review the decision . . . and make such order in respect thereto as he thinks fit".

Conflicting statutory jurisdiction

Does anything in the Children and Young Persons Act or in the Guardianship Act itself preclude the exercise of these judicial powers in the case of a child who has become a state ward? It is submitted that s 34 of the Guardianship Act, which appears to have been overlooked in most of the decisions affirming the Courts' continuing jurisdiction under the Guardianship Act, is of crucial importance. That section reads:

> Except as expressly provided in this Act, nothing in this Act shall limit or affect the provisions of the [Children and Young Persons Act 1974] . . . .[5]

The meaning of "except as expressly provided" is not as straightforward as one might expect,[6] but even taking the wider view that it covers a clear implication it is submitted that there is no such implication here that the above powers should prevail against the provisions of the Children and Young Persons Act. Their exercise in respect of state wards without the concurrence of the Director-General of Social Welfare is therefore probably precluded.

It is arguable that the position would be different if the Director-General supported or consented to the making of an order under the Guardianship Act, because then the exercise of the jurisdiction would not constitute an interference with his statutory powers and discretions. The Director-General might for example support the making of a custody order in favour of foster parents with whom he had placed a child, thus giving the placement some residual security in the event of a subsequent attempt by the natural parents to have the guardianship order cancelled by a Children and Young Persons Court under s 64 of the Act.

The above view is perhaps indirectly supported by s 17(4) of the Guardianship Act which expressly provides that the Court's powers under s 17 to vary or discharge orders with respect to custody, upbringing, access or guardianship do not apply to orders under the Children and Young Persons Act. It seems unlikely that Parliament would have intended the continued application of ss 11, 12, 14, 15 and 16 when that could entail the effective variation or discharge of such orders. It is arguable of course that the absence of a similar express limitation in each of those sections suggests the opposite intention. The more likely explanation is that the draftsman considered s 34 adequate cover in relation to those sections but not in relation to s 17 which, but for subs (4), might have been construed as "expressly" providing for variation and discharge of orders under the Children and Young Persons Act.

Judicial decisions

There are however unreported decisions affirming the Courts' continuing jurisdiction under the Guardianship Act to grant access by a parent to a child who has become a state ward or to make a custody order in relation to such a child. In *H v DSW*[7] the argument against the Court's jurisdiction appears to have been based solely on s 49 of the Children and Young Persons Act which describes the effect of a guardianship order. In a brief oral judgment the learned Judge rejected the jurisdictional argument but went on to dismiss the application for access on the merits.

In the second case to deal with a claim for access, *B v Director-General of Social Welfare*,[8] much closer consideration was given to the jurisdictional position. G J Seeman SM, while accepting that under the Children and Young Persons Act the Director-General is given certain special powers in relation to state wards, powers that are not given to guardians generally, held that the term "guardianship" in the Children and Young Persons Act is nevertheless used in the same sense as in the Guardianship Act itself, and that the Director-General's position could not be treated as immune from review by the Courts in the exercise of their jurisdiction under the Guardianship Act in the absence of a clear direction by Parliament to the contrary. The learned Magistrate seems to have overlooked s 34 of the Guardianship Act which, it is submitted, may be just such a direction. He said (at p 4 of the judgment):

> In the absence of any clear expression by Parliament to the contrary the provisions of the Children and Young Persons Act are to be read in conjunction with the provisions of the Guardianship Act.

Section 34 makes it clear that the provisions of the Guardianship Act are not to "limit or affect" the provisions of the Children and Young Persons Act. Especially in view of the fact that the Children and Young Persons Act contemplates that a social worker may restrict or even entirely forbid communication by parents with a child in care[9] the application of s 15(2) of the Guardianship Act in this context would surely "limit or affect" the provisions of the Children and Young Persons Act.

Regarding custody applications in respect of state wards the High Court has twice affirmed its continuing jurisdiction: *B v B & Director-General of Social Welfare*;[10] *Re A, A v A*.[11] In the former decision no reference was made to s 34 but the Court declined in the end to make a custody order anyway. In the later case s 34 was considered but was not regarded as ousting the jurisdiction. The learned Judge was particularly influenced by the wording of s 49(8) of the Children and Young Persons Act, which seems to contemplate the possible existence of additional guardians alongside the Director-General.

In earlier decisions relating to the Child Welfare Act 1925 and the Industrial Schools Act 1908 it was accepted that there was no jurisdiction under the Infants Act 1908 or the Guardianship of Infants Act 1926 or the Guardianship Act 1968 to make any order relating to the guardianship or custody of a child who had been committed to the care of the Superintendent of Child Welfare or to an Industrial School: see *Re Y Infants, Y v Y* (1968) 12 MCD 305 (and the cases cited therein) and *W v K* (1973) 14 MCD 86.

An arguable intermediate view is that the jurisdiction to make a custody order is not altogether ousted but that any order made has only residual effect, ie it only becomes effective when the guardianship order in favour of the Director-General is discharged by him or cancelled by a Children and Young Persons Court. In the meantime it merely indicates who, as between the former custodians and the party obtaining the new order, will be entitled to custody after the Director-General ceases to be in control.

The wardship jurisdiction

Whether the High Court's wardship jurisdiction, affirmed in s 9 of the Guardianship Act, is in any different position and might apply to state wards even if the powers under ss 11, 12, 14, 15 and 16 do not, is one of the primary

concerns of this article and will be discussed below along with the principles that will govern the exercise of the jurisdiction if in fact it is not ousted altogether.

In addition to possibly providing a useful remedy to natural parents,[12] foster parents,[13] and children[14] in the context of the Children and Young Persons Act the wardship jurisdiction might also be invoked by the Director-General himself in an attempt to supplement his powers under that Act.[15] Thus, for example, the Director-General, who lacks a statutory right of appeal against the discharge of a guardianship order by a Children and Young Persons Court, might seek to freeze the status quo by instituting wardship proceedings and thereby continue the child's placement with the foster family until the welfare issue can be considered at a higher level. Or the Director-General might wish to use the wardship jurisdiction to gain more effective control over the behaviour of a parent or relative which he considered to be threatening the security of a state ward in institutional or foster care. Again the Director-General might invoke the jurisdiction where, in his view, a parent was hastily and without consideration for the child's welfare seeking to terminate a s 11 agreement prematurely.[16]

Judicial guidance

The Children and Young Persons Act itself does not expressly deal with the use of wardship proceedings within the area covered by it. The only reference to wardship is in s 49, which provides that a guardianship order made under the Children and Young Persons Act in respect of an existing ward of Court has the effect of terminating the wardship. This is of no help in answering the questions raised above, most of which concern the use of wardship where a guardianship order under the Act is already in force. In addition to the Act's silence on this problem there is an almost total lack of judicial guidance in the New Zealand context, so a discussion of the interrelationship between the Children and Young Persons Act and the wardship jurisdiction must be largely speculative.

Similar issues have arisen in England, however, so guidance may be sought from cases decided there. Although the concept of wardship, an ancient common law institution, is now recognised by statute in New Zealand (Guardianship Act 1968, s 9) although some of the statutory rules governing it depart slightly from the common law (eg as to who may apply s 9(2)) the general powers which the High Court has in the exercise of its jurisdiction are to a large extent those which it had at common law before the Act was passed (s 9(3)). In that respect therefore the precedent value of English decisions clarifying the Court's powers in wardship is not significantly diminished. Greater differences exist however between the statutory schemes in each country for state care of children, and for this reason English decisions as to the proper scope of the wardship jurisdiction in relation to the statutory jurisdiction must be approached with some caution.

2. Use of the wardship jurisdiction by individuals

Although the procedures by which children come into care in England,[17] their appeal rights and those of their parents, and the procedures for terminating care differ in many respects from those in New Zealand under the Children and Young Persons Act 1974, it is submitted that several principles emerging from the English cases dealing with the relationship between wardship of Court and the powers of local authorities in relation to children in care are relevant in the New Zealand context. In both countries legislation has conferred powers and discretions in relation to the care of children on public bodies (in England local authorities, in New Zealand the Department of Social Welfare) without specifying the effect of the statutory schemes on the High Court's wardship jurisdiction.

English case law

Principles emerging from the English cases may be stated as follows:

(i) The wardship jurisdiction can only be removed or curtailed by express statutory enactment and is therefore not ousted in this context: *Re M (an infant)* [1961] Ch 328, *Re Baker (infants)* [1962] Ch 201.

(ii) Nevertheless statute may by implication restrict "the scope of the proper exercise of the jurisdiction": *Re Baker (infants)* per Pearson LJ, at 223. Thus, where legislation has entrusted all decisions as to the welfare of children in care to the discretion of local authorities, the Court will not exercise its wardship jurisdiction simply to substitute its view on the welfare issue for that of a local authority. In other words the Court will not act as an appellate authority reviewing the matter on the merits: *Re W (minors)* [1979] 3 All ER 154, 157 per Bridge LJ. This principle was initially stated in the present context on applications by foster parents[18] but is equally true of applications by natural parents.[19] Although there appear to be no authorities directly in point it would presumably apply also to applications by children.

(iii) If, however, a local authority is alleged to have acted not merely wrongly (ie inconsistently with a child's welfare) but with impropriety or in breach or disregard of its statutory duties, then the wardship jurisdiction may properly be invoked to control such activities: *Re M* (supra), *Re T (AJJ)* (supra, n 18). In adopting this approach, which is said to allow a "supervisory" as opposed to an "appellate" jurisdiction, the Courts have been guided by the general principles of administrative law governing judicial review of decisions arrived at in the exercise of statutory discretions. The best known statement of these principles is in the judgment of Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] 2 All ER 680, 682-3:

> . . . the Court is entitled to investigate the action of the local authority with a view to seeing whether it has taken into account matters which it ought not to take into account, or, conversely, has refused to take into account or neglected to take into account matters which it ought to take into account. Once that question is answered in favour of the local authority it may still be possible to say that the local authority, nevertheless, has come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the Court can interfere. The power of the Court to interfere in each case is not that of an appellate authority to override a decision of the local authority, but is that of a judicial authority which is concerned, and concerned only, to see whether the local authority has contravened the law by acting in excess of the powers which Parliament has confided in it.

In the context of wardship, examples of activities justifying intervention would be where a local authority's decision is based on its social worker's personal

hostility towards the child's foster parents[20] or "where the authority has failed strictly to observe the procedure laid down in s 2 of the 1948 Act".[21] Another example occurred in *Re D.*[22] The local authority in that case did not initially object to the wardship application and the Official Solicitor investigated as guardian ad litem for the child. He made a recommendation to the Court which differed from the local authority's view and the authority then took a preliminary point that the Court should not exercise its wardship jurisdiction to interfere with the authority's exercise of its statutory discretion. The Court gave two reasons for considering the case on its merits: (i) the difference of opinion between the Official Solicitor and the local authority; (ii) the fact that not all of the material necessary for the proper exercise of the discretion had been put before the local authority sub-committee which made the decision. Given the unusual circumstances in *Re D* it probably does not indicate an increased readiness on the part of the High Court in the exercise of its wardship jurisdiction to interfere with discretionary decisions by local authorities.[23] It is normally said that there is a heavy onus on a party alleging impropriety or unlawfulness in the exercise of a discretionary power.[24]

It will investigate the merits and arrive at its own decision on them. Ultimately therefore the jurisdiction is more than "supervisory". The approach to whether it should be exercised in a given case is a supervisory one, but once . . .

As will have been noticed from *Re D*, once a ground for the exercise of the wardship jurisdiction has been made out (ie impropriety etc) the Court does not simply quash the decision and send the matter back to the authority for further consideration. It will investigate the merits and arrive at its own decision on them. Ultimately therefore the jurisdiction is more than "supervisory". The approach to whether it should be exercised in a given case is a supervisory one, but once that hurdle has been crossed the exercise of the wardship jurisdiction effectively allows an appeal.

(iv) A distinction is to be drawn between an attempt to interfere with a local authority's discretion and an attempt to remove a child altogether from the control of a local authority. In the latter case "where the challenge is directed, not to the exercise of a discretionary power, but to the source of that power"[25] the Court will exercise its wardship jurisdiction provided "the circumstances are sufficiently unusual to justify [its] intervention".[26]

The New Zealand position

The application of each of these principles in New Zealand will now be commented on.

No ouster of wardship jurisdiction

In relation to the first principle it is arguable that the wardship jurisdiction has in this context indeed been removed by express statutory enactment viz s 34 of the Guardianship Act 1968, discussed above. In *Re T* [1977] 1 NZLR 545, however, Jeffries J held that the wardship jurisdiction is not ousted. Unfortunately no reference was made to s 34. It is submitted that even when s 34 is taken into account the High Court might still hold that its wardship jurisdiction is not ousted in relation to the Children and Young Persons Act. The case for this conclusion is by no means overwhelming but the following reasons are suggested:

(i) The affirmation in s 9 of the Guardianship Act that the wardship jurisdiction applies to "*any* unmarried child" may constitute an express contrary provision of the kind referred to in s 34.

(ii) The wardship jurisdiction is an ancient and very wide power stemming in theory from the position of the Crown as parens patriae. "It is a jurisdiction not from its nature and origin to be lightly cut down."[27] The Courts are therefore unlikely to allow it to be whittled away except by the clearest statutory words.

(iii) If the wardship jurisdiction had been left to be governed entirely by the common law rather than being put on a statutory footing by the Guardianship Act this problem would not have arisen, because the wardship jurisdiction would then not have been covered by the phrase "nothing in this Act". It would seem odd and unfortunate that the act of giving statutory recognition to the wardship jurisdiction, while at the same time affirming its content in terms of the pre-existing law,[28] should have the (accidental?) consequence of curtailing that jurisdiction in relation to a different statute viz the Children and Young Persons Act.[29] It would be a different matter if the alleged statutory ouster of the wardship jurisdiction were contained in the Children and Young Persons Act itself, but in fact that Act contains nothing which could be said to amount to an express curtailment of the wardship jurisdiction.

(iv) The High Court is likely to be more willing to interfere with the Director-General's guardianship of a child by substituting itself as the child's guardian (which is the effect of a wardship order) than by directly conferring rights of custody, access, or control over upbringing on parents or other individuals. It is primarily for this reason that in considering the effect of s 34 a distinction may be drawn between wardship and other forms of jurisdiction under the Guardianship Act that were discussed above.

It is submitted therefore that the decision in *Re T* might prevail. However, the learned Judge in that case expressly limited his decision to the ruling against ouster of the jurisdiction, and gave no indication of the principles that would govern its actual exercise.

Limitations on review of merits

As to the interrelated second and third principles, although there has apparently been no occasion for their adoption by the New Zealand Courts, the *Wednesbury Corporation* test from which they are derived has been applied in other contexts by the Courts of this country[30] and can surely be presumed relevant here also. The effect of this assumption is that an allegation that the DSW is in error in its view of the child's interests (as elaborated and qualified in s 4 of the Act[31]) will be insufficient to justify intervention by the High Court: only a showing of "improper" or "unlawful" action by the DSW will support the exercise of the wardship jurisdiction.[32] The fact that promotion of the child's welfare is elevated to a statutory duty for DSW officers will not alter this position. The duty under s 4 is not an absolute duty *to be correct* in determining the child's interests. It is only a duty to treat as paramount what are considered in good faith to be the child's interests (as elaborated and qualified in the section). Therefore an allegation that the DSW has misconceived the child's interests will not of it-

self amount to an allegation of "unlawfulness" justifying intervention. It will be necessary to show that the decision was not taken in good faith, or that in arriving at it preference was given to some factor other than the child's interests (eg cost, institutional considerations), or that the decision is so clearly contrary to the child's welfare that no reasonable person could have arrived at it.[33]

It is arguable that this position is unsatisfactory and that decisions by the DSW in the exercise of discretionary powers under the Act should be more readily open to judicial or independent review on their merits. As this is in effect an argument that the Children and Young Persons Act has conferred too much discretion on officers of the DSW it is clear that the use of the wardship jurisdiction is not the most appropriate response to it. Change in the legislative policy should come from Parliament itself. That a similar situation in England requires attention was accepted recently by Ormrod LJ in *Re W* (supra, at 163) but it was also pointed out that the solution is by no means obvious.

Removal from state care

As to the fourth principle, there are grounds on which its applicability in New Zealand may be doubted. The New Zealand Act gives the Director-General a discretionary power to discharge a guardianship order at any time "if [he] is satisfied that it is in the interests of the child or young person and consistent with the public interest to do so", s 49(6). If the Director-General refuses a request by the child or the parents that he exercise this power, then, provided the request was made at least 12 months after the commencement of the order or 12 months have elapsed since a previous application for review, as the case may be, application may be made under s 64 to a Children and Young Persons Court for review of the order. In exercising its discretion under s 64 to cancel a guardianship order the Court is to have regard —

> to the reasons for the guardianship order, the environment in which it is proposed that the child or young person shall live, and any other circumstances of the case . . .".

Section 4 of the Act is not referred to in this context, nor is it expressly excluded. The effect of the broad and flexible criteria in s 64 would appear to be to *permit* cancellation where it is in the interests of the child, without making the child's interests "the first and paramount consideration". The substantial criteria for review in s 64 are *more* favourable to applicants than the simple application of s 4 would be. Since the Act provides a clear procedure for review and one in which the child's welfare may be taken into account the reasoning in *Re H* (supra, n 19) on which this fourth principle is based loses its force in the New Zealand context. A crucial factor in that decision, it is submitted, was that although there was a statutory procedure under which the parents could have sought the discharge of the care order by the juvenile Court, that Court could not have acted on an overall view of the child's long-term welfare in the way that the High Court could in its wardship jurisdiction. In other words the juvenile Court's power to protect the interests of the child was in the unusual circumstances of the case inadequate compared with that of the High Court. This was because of s 21(2A) of the Children and Young Persons Act 1969, which would have precluded the juvenile Court from discharging the care order unless satisfied that the child would receive the care and control which she required. Since there was a risk of further physical assault this condition was not met. On the other hand, keeping the child in the care of the local authority when her parents were going to return permanently to their native country would jeopardise her welfare in another way. It would create a risk of "severe and lasting psychological injury" from growing up "in total isolation from her sisters and family, and in an alien cultural surrounding".[34] Unlike the juvenile Court the High Court in its wardship jurisdiction could balance these risks, and Balcombe J in the Family Division had decided on the basis of "a very full, careful and balanced assessment by a psychiatrist" that the child should be returned to her parents' care when they finally left England. His decision was upheld by the Court of Appeal.

Adequacy of s 64

It is submitted that, since under the New Zealand legislation the powers of the Children and Young Persons Court in circumstances such as those in *Re H* are adequate to protect the child's welfare, the decision in that case loses its value as a precedent for the New Zealand Courts. The only ground on which it could be argued that the statutory power of review is inadequate relates not to the substantial criteria for cancellation of a guardianship order but to the procedural limitations on seeking review. No review can be sought under s 64 unless the guardianship order has been in force for at least 12 months, and if the application is unsuccessful further reviews can only be sought at 12 monthly intervals. However the Director-General may in his discretion discharge the order at any time within this period.[35] It seems unlikely that the High Court would use its wardship jurisdiction in favour of parents to supplement their deliberately limited statutory opportunities for review.[36] An exception might be recognised if it could be shown that the Director-General's refusal to discharge the guardianship order was made in bad faith or was clearly based on the wrong considerations or was so obviously contrary to the child's welfare that no reasonable person could have made such a decision.

Likewise there seems to be little scope for parents to use the High Court in its wardship jurisdiction as an effective avenue of appeal. The Act does not give an unsuccessful applicant to the Children and Young Persons Court for review of a guardianship order any right of appeal to the High Court. Even if this is thought to have been an oversight by the draftsman the use of wardship as a de facto appeal procedure is hardly likely to be welcomed by the Court. The remedy lies in amendment of the Act. It is arguable that the balance in the Act between parental rights and Departmental discretion should be radically altered by allowing guardianship orders to be made for fixed terms in appropriate circumstances.[37] Review would then be automatic at the end of the term specified and the Department would be required to demonstrate the need for its continued control. This would introduce a desirable measure of accountability by the Department which is absent from the present system, and would perhaps help reduce the gap between promise and performance in state intervention in parent-child relationships.

3. Use of the wardship jurisdiction by public bodies

When the wardship jurisdiction is invoked not *against* a local authority but *by* it the problem of conflict with statute seen in the former context does not arise, at least not to the same extent.

Consequently the English Courts have more readily allowed, and even encouraged, local authorities to use the wardship jurisdiction in attempts to supplement their statutory powers or acquire de facto rights of appeal against decisions of the juvenile Court. Relevant propositions emerging from the cases will first be stated and illustrated then considered for their application in New Zealand.

English case law

(i) Where the statutory powers of a local authority are inadequate to enable it to protect the interests of a child in its care when the child's welfare is threatened by the behaviour of parents or outsiders which falls short of an attempt actually to remove the child from the local authority's care, the wardship jurisdiction may be exercised to supplement the local authority's powers to the extent necessary for the child's protection. This principle is illustrated by *Re B (a minor)* [1975] 2 WLR 302. The wardship application in that case was actually made by the child's grandmother who sought an order granting care and control of the child to her. The local authority opposed such an order but requested the Court to make the wardship order for other reasons, viz to put it in a better position to deal with the threat posed to the child by her violent stepfather. The order was made and explained by Lane J as follows (p 309):

> This order gives the local authority immediate recourse to the High Court at all times for assistance in the discharge of their duties to the ward. Should the circumstances warrant this, they could apply, for example, for an injunction restraining the stepfather from endeavouring to ascertain the whereabouts of the child, or from approaching within a specified distance of where she lives, or from making any contact with her. Further, if there were any breach of such an order, the Court could commit the stepfather to prison for contempt of Court.

(ii) Where a child is in the transient care of a local authority under s 1 of the Children Act 1948 (ie is subject to removal from care after notice by a parent) the wardship jurisdiction is unaffected and may be exercised to prevent a parent from removing the child if removal is contrary to the child's interests. This principle was upheld in *Re R (K)*[1963] 3 All ER 337, where the foster parents of a 4-year-old child, having cared for him all of his life, applied jointly with the local authority to ward the child when the mother gave notice that she required his return. It was held, against the mother's objection, that the merits of the case should be inquired into by the Court and the child was left with the foster parents pending the final determination. *Re M* was distinguished on the ground that that was a s 2 case (ie there had been an assumption of parental rights by the local authority with the result that the child was no longer subject to removal on parental notice). This meant that the foster parents' application in that case amounted to an attempt to interfere with the local authority's exercise of its statutory discretions.

The principle is also illustrated by *Re G (infants)* [1963] 3 All ER 370. In that case the children, who had been in a local authority's care under s 1, were made wards of Court initially on the mother's application, but in exercising its wardship jurisdiction the Court later imposed conditions designed to ensure that the local authority's continuing statutory care of the children would not be terminated inconsistently with their welfare. In other words the weaknesses and precarious nature of s 1 care were overcome by interlocking the prerogative jurisdiction with the statutory jurisdiction.

Again in *Re S* [1965] 1 All ER 865 it was affirmed by the Court of Appeal that the wardship jurisdiction is not restricted in relation to a child in care under s 1. In that case the application was made by foster parents *without the concurrence of the local authority* but *Re M* was still distinguished. It was held that the merits should be investigated by the Court.

(iii) If a juvenile Court discharges a care order in spite of opposition by the local authority based on the child's welfare, the local authority, which has no power of appeal against the discharge, may invoke the wardship jurisdiction in order to prevent the return of care and control to the parents. In the High Court's decision on the merits the welfare of the child will be the first and paramount consideration. If a child is warded in these circumstances the Court might appoint the foster parents as agent or it might appoint the local authority itself. Furthermore there is now express power in England under the Family Law Reform Act 1969, s 7 for the High Court in exercising its wardship jurisdiction to make a care *order* in favour of a local authority. The effect of such an order is to activate some of the local authority's power under the Children Act 1948 though subject to any directions the Court may give (s 7(3)).

The propriety of this use of wardship by local authorities was established by *Re D.*[38] The argument that it amounted to an attempt to appeal the Justices' decision to discharge the care order even though Parliament had decided that there should be no such appeal by a local authority failed to convince Dunn J that it would be wrong for the High Court to intervene.

This meant that different considerations would be taken into account in the High Court from those taken into account by the Justices so that . . .

The learned Judge pointed out that in proceedings for the discharge of a care order under the Children and Young Persons Act 1969 the welfare of the child was not the first and paramount consideration whereas it was always the paramount consideration in wardship proceedings.[39] This meant that different considerations would be taken into account in the High Court from those taken into account by the Justices so that wardship proceedings in these circumstances were not simply a de facto appeal. His Lordship made this general comment:[40]

> Far from local authorities being discouraged from applying to the Court in wardship, in my judgment they should be encouraged to do so, because in very many of these cases it is the only way in which orders can be made in the interests of the child, untrammelled by the statutory provisions of the Children and Young Persons Act 1969.

(iv) If an application by a local authority for a care order is refused in the first instance because the authority has failed to establish one of the

statutory grounds for intervention, the local authority, lacking any right of appeal, may instead in exceptional circumstances invoke the wardship jurisdiction. In that context the welfare of the child will be the first and paramount consideration, whereas in the initial proceedings it would not have been since it only becomes decisive under the Children and Young Persons Act *after* one of the statutory grounds has been made out.

This use of wardship was suggested by Dunn J in *Re D* (supra, n 38) even though he was not faced with that particular situation. The Court of Appeal has since affirmed Dunn J's view: *Re C.*[41] In an application for a care order the Justices had decided that the case was not proved. Having no right of appeal the local authority instead instituted wardship proceedings. The Court of Appeal agreed with Dunn J's view in *Re D* that the approach of the juvenile Court was different from that of the Family Division Judge in wardship proceedings where the child's interest is in the forefront of the case from beginning to end. The unreported decision of the Court of Appeal has been summarised (at 66) as follows:

> The primary test to be applied is whether the interests of the child *prima facie* require the High Court to intervene. This will usually involve something 'special' to the particular case but the issue is not whether the reasons for initiating wardship proceedings are special but whether the interests of the child under the particular circumstances justify the wardship proceedings. In this case the responsible local authority which had had the child in its care for six months (nearly half the child's life) had felt sufficiently strongly about the Magistrates' decision to issue a summons the same day to protect the child. In any case where a local authority was faced with this dilemma, it would be wrong to refuse to entertain their originating summons when they decide to issue one. The case should be investigated.

In New Zealand

The applicability of these principles in New Zealand will now be considered.

Supplementing statutory powers

Regarding the first principle there appears to be nothing to bar the use of wardship by the Director-General in order to supplement his statutory powers in relation to children in care but the need for such resort to the procedure may be less than that of local authorities in England. This is because the wide powers conferred on the Director-General and social workers under the Children and Young Persons Act 1974 should sufficiently enable them to control behaviour by parents or outsiders that is threatening a child's welfare. For example social workers may give instructions to parents and others regarding communication with a child in care and a breach of those instructions is an offence under s 103(2)(d). Other offences include inciting a child to depart from a Social Welfare institution or from the custody of foster parents, s 103(2)(a), entering institutions without authority, s 103(2)(e), and obstructing a social worker in obtaining possession of a child under the guardianship of the Director-General, s 103(2)(g). But these offences are punishable only by fines. The flexibility of the wardship jurisdiction, together with the effectiveness of the threat of committal for contempt if a directive given by the Court is breached, may sometimes make wardship proceedings an attractive alternative from the point of view of the DSW.

Preserving voluntary care

The second principle could be applied in New Zealand to a child in the care of the Director-General under a s 11 agreement. Such care shares the essential feature of s 1 care in England, viz legal insecurity. Regardless of any term specified in a s 11 agreement for its duration it "may be terminated at will by either party giving notice to the other", s 11(4). Such termination and resumption of care by a parent could be contrary to the child's welfare especially where the child has been in a foster home from a very early age or for a long period. The use of wardship in these circumstances might be a more efficient and sure way of protecting the child's welfare than the alternative of instituting complaint proceedings under s 27. Moreover it might be difficult to establish one of the grounds of complaint even if there were grounds at the time the agreement was entered into. In wardship proceedings however the focus would be on the child's welfare throughout. They have the added advantage of freezing the status quo as soon as they are instituted. This could be done before the child was returned to the parents thereby preserving his former placement pending determination of the merits. A wardship application was recently made by the Director-General in this very context.

The second principle could also be relevant in the situation where an agreement relating to the control of a child has been entered into between the parents of the child and the manager of a home registered under Part IX of the Act (ie a home run by an organisation such as Anglican Social Services or Catholic Social Services). Section 94(3) provides a procedure for the enforcement of such an agreement during its currency. Section 94(5) provides for complaint action by the manager on or before the expiry of such an agreement if it is believed that the agreement will not be renewed or extended and that it would be contrary to the interests of the child to be returned to his parents' control. If satisfied of these matters a Children and Young Persons Court may make a guardianship order in favour of the Director-General. Wardship of Court might offer a useful alternative to this kind of complaint action. The principal advantage of wardship in this situation would be that the manager of the home (or the child's foster parents if he has been fostered in a private home) could be appointed the agent(s) of the Court rather than the Director-General being made the child's guardian under s 94(5). Such an application in wardship by the manager of a home or by foster parents would require the leave of the Court under s 9(2)(d) of the Guardianship Act.

Alternatively, the Director-General could under s 9(2)(b) of the Guardianship Act institute the wardship proceedings without leave and seek the appointment of himself or the manager of the home or the foster parents as the Court's agent(s). An application in wardship was successfully made in this context by the Director-General in a recent case.[42]

Section 64

The use of wardship proceedings by the DSW as a de facto appeal to the High Court against a Children and Young Persons Court's cancellation of a guardianship order also occurred recently, apparently for the first time: *Director-General of Social Welfare v B.*[43] The applicability of *Re D* (supra, n 38) was not given close consideration however as the jurisdictional point seems not to have been pressed by

counsel for the mother. An important step in the reasoning of Dunn J in *Re D* was that the essential criterion for the discharge of a care order was not, unlike that in wardship proceedings, the welfare of the child. It is submitted that the precedent value of *Re D* in New Zealand depends on whether there is likewise a difference between the criterion for cancellation of a guardianship order and the criterion in wardship proceedings. If there is no difference the use of the wardship jurisdiction in this context would amount simply to allowing a right of appeal which Parliament has legislated against, and would therefore be very questionable. It is clear that in wardship proceedings in this situation the interests of the child would be the first

If there is no difference the use of the wardship jurisdiction in this context would amount simply to allowing a right of appeal which Parliament has legislated against, and would therefore be very questionable.

and paramount consideration.[44] Much less clear is the criterion for review of a guardianship order under the Children and Young Persons Act 1974. Section 4 of the Act makes the interests of the child as elaborated and qualified in the section[45] the first and paramount consideration for "[a]ny Court which . . . exercises . . . any powers conferred by this Act . . .", which presumably includes the power to review a guardianship order. However the review section (s 64) does not refer to s 4 or to the paramountcy of the child's interests but indicates other factors to be taken into account, in particular "the reasons for the guardianship order" and "the environment in which it is proposed that the child shall live". This can be read as making the essential criterion for review whether the applicants have improved their positions to the extent that the original grounds for intervention and removal of the child are no longer present, rather than whether it is in the best interests of the child to be returned. On this approach there is room for the "blood-tie" to be influential: parents are seen as reasserting their "natural right" to care for their child. If this interpretation was intended by the draftsman s 64 should have commenced with the words "Notwithstanding s 4 . . .". Uncertainty over the meaning of s 64 is increased when it is realised that the Director-General, in considering the request for discharge which must precede any application for review under s 64, is required by s 49(6) to base *his* decision on "the interests of the child" and "the public interest". This is much closer to s 4. In addition to the specified factors in s 64 there is the catchall "and any other circumstances of the case". Under this heading the welfare of the child *could* be taken into consideration but would not necessarily override the other factors. The position therefore seems to be that, although cancellation of a guardianship order could be refused on the ground that such cancellation would be contrary to the child's interests, it would not *have* to be refused: a Court could legally cancel a guardianship order in spite of feeling that the child's welfare would be better assured in the continued care of the foster parents. Since therefore the criteria for review and the criterion in wardship proceedings are probably different it is submitted that the reasoning in *Re D* is applicable and the wardship jurisdiction may properly be exercised in this context.

Section 27

Finally the use of wardship as a de facto appeal against the dismissal of a s 27 complaint. This contains the seeds of a complete undermining of the statutory scheme for state intervention between parent and child. Parliament has understandably seen fit to require the proof of more specific grounds than the child's "welfare" before coercive state intervention in parent-child relationships occurs. It is only *after* a ground is established that the child's interests come into play as the first and paramount consideration: see Barker J in *H v DSW*[46]. Parliament has also seen fit not to confer on complainants any right of appeal against the dismissal of complaints. If wardship may be used by the DSW after an unsuccessful complaint, is there anything to stop it being used in the first instance in preference to complaint proceedings, thereby avoiding the need to prove grounds for intervention other than the child's welfare and avoiding the (admittedly limited) safeguards in the Children and Young Persons Act 1974 for parental interests? This clearly cannot have been Parliament's intention. It is submitted therefore that *Re C* should be treated with reserve in New Zealand. The use of wardship in this context would entail a more serious conflict with the statutory jurisdiction under the Children and Young Persons Act than does its use in the previous situations discussed, where the child is already in care either after proof of the necessary grounds for state intervention or on the basis of parental agreement.

4. Conclusion

It is submitted that the fact that wardship proceedings are seen to be necessary in order to ensure proper accountability by the Department of Social Welfare, and in order to protect children in some situations within the purview of the Children and Young Persons Act, is proof that the Act is defective and is failing fully to achieve its stated purposes. The need to resort to the wardship jurisdiction, the scope of which in this context is unclear, should therefore be removed by reforming the Children and Young Persons Act. Attention should be given in particular to:

The need to resort to the wardship jurisdiction, the scope of which in this context is unclear, should therefore be removed by reforming the Children and Young Persons Act.

(a) the need to limit the making of guardianship orders to cases where there is no alternative way of protecting the child;
(b) the need for automatice review of such orders;
(c) the need for independent review of important discretionary decisions;
(d) the need for adequate appeal rights for all parties;
(e) the importance, where long term placement of a child away from his natural parents has occurred, that that placement be given legal security and not be terminated inconsistently with the child's interests.

1. J Eekelaar "Family Law and Social Policy" (Weidenfeld and Nicolson 1978) p 115.
2. Eg ss 46, 49, 50, 67(1), 76(1), 78(1), 80(2), 81(3), 103(2)(d), 103(2)(g).
3. *Johnson v Director-General of Social Welfare (Vic)* (1976) 50 ALJR 562, 564.
4. Such a child will for convenience be

referred to as a "state ward".

5. The substitution of the Children and Young Persons Act 1974 for the Child Welfare Act 1925 is by virtue of the Acts Interpretation Act 1924, s 21(1).
6. See *Davidson v Perpetual Trustees* [1979] Butterworth's Current Law 462, *Harding v Coburn* [1976] 2 NZLR 577, 584, and N J Jamieson "Except as otherwise expressly provided" [1980] NZLJ 107.
7. Somers J, Christchurch, 22 August 1978, M 191/78.
8. Magistrates Court, Dunedin, 15 October 1979, MDP 74/79.
9. S 103(2)(d). See also the powers implied in other paragraphs of that subsection.
10. Supreme Court, Auckland, M 963/76, 3 Nov 1977.
11. High Court, Auckland, M 782/79, 3 March 1981.
12. Parents can invoke the wardship jurisdiction under s 9 of the Guardianship Act 1968 even if they have ceased to be guardians of the child in question: see subs (2)(a).
13. Foster parents would require the leave of the Court before making an application (unless they came within the definition of "near relatives"): s 9(2)(a) and (d).
14. The child may apply "without guardian ad litem or next friend": s 9(2)(c).
15. The Director-General is specified as one of the parties entitled to invoke the jurisdiction without special leave: s 9(2)(b).
16. A s 11 agreement, which effectively gives guardianship in all but name to the Director-General, "may be terminated at will by either party giving notice to the other": subs (4).
17. The principal UK statutes are the Children Act 1948, the Children and Young Persons Act 1969, and the Children Act 1975.
18. *Re M* supra n 24; Re T (AJJ) (an infant) [1970] Ch 688.
19. *Re H (a minor)* [1978] 2 All ER 903 per Ormrod LJ at pp 908-909; *Re W (minors)* supra n 27.
20. Bevan — *The Law Relating to Children* (Butterworths 1973) p 414.
21. Ibid, citing *Re L (AC) (an infant)* [1971] 3 All ER 743.
22. *The Times*, 14 February 1978; 92 Adoption & Fostering 58 (1978).
23. Cf Parry "Recent Developments in the Law Relating to Children" 123 Solicitors' Journal 548 (1979).
24. Eg *Re W* supra n 27, per Bridge LJ at p 161.
25. *Re H* supra n 29 per Ormrod LJ at p 909. The reasoning and decision have been criticised: see Kent "The Future of Care Proceedings" (1978) 8 Family Law 124.
26. Idem. This test was held not to be met in *M v Humberside County Council* [1979] 2 All ER 744.
27. *Re M* [1961] Ch 328, 338 per Lord Evershed MR.
28. Limited modifications to the Court's pre-existing common law powers arise from the provisos to s 9(3).
29. This view is perhaps reinforced by s 33(3) of the Guardianship Act which preserves, "in matters not provided for" by the Act, the High Court's pre-existing powers in relation to children.
30. Eg *Mitchell v NZBC* [1970] NZLR 314; *Rowling v Takaro Properties* [1975] 2 NZLR 62 (CA); *Van Gorkom v Attorney-General* [1978] 2 NZLR 387 (CA).
31. Section 4 reads: "Any Court which or person who exercises in respect of any child or young person any powers conferred by this Act shall treat the interests of the child or young person as the first and paramount consideration to the extent that this is consistent with adopting a course calculated to —
(a) Secure for the child or young person such care, guidance, and correction as is necessary for the welfare of the child or young person and in the public interest; and
(b) Conserve or promote as far as may be possible a satisfactory relationship between the child or young person and other persons (whether within his family, his domestic environment, or the community at large)."
32. When the jurisdiction is exercised the interests of the child will be the first and paramount consideration if the application relates to "the custody or guardianship of or access to [the] child": s 23, Guardianship Act 1968. This test could conceivably give different results from the criterion applicable under the Children and Young Persons Act which incorporates "the public interest" as well: see s 4, supra n 46.
33. Cf Jones "The Local Authority and the Ward of Court" Social Work Today Vol 9 No 14 p 20 at p 21.
34. Per Ormrod LJ at p 911.
35. S 49(6). The existence of this statutory discretion renders unreal in the New Zealand context the distinction drawn in *Re H* between "seeking to influence the local authority's discretion" and seeking "to remove the child altogether from the control of the local authority" (per Ormrod LJ at p 909).
36. See the discussion of the second and third principles above.
37. See the comments of Judge Hay in *B v DSW* Unreported, Timaru, 9/5/80 CR 299/73 and 96/74; DP 93/75.
38. [1977] 2 WLR 1006. The decision has been thoughtfully and convincingly criticised: see Kent "The Future of Care Proceedings" (1978) 8 Family Law 124.[39] Strictly speaking it is only the paramount consideration in wardship proceedings relating to custody, care and control, or access. In other contexts the welfare of the child may have to be balanced against other interests, eg the public interest in freedom of publication: see *Re X* [1975] 1 All ER 697. The distinction between the "custodial" jurisdiction in wardship and the "protective" jurisdiction is elaborated by N V Lowe and R A H White in *Wards of Court* (Butterworths 1979).
40. [1977] 2 WLR at p 1011. For a critical view see Kent supra n 65.
41. Unreported 2/2/79. Noted in 97 Adoption and Fostering at p 65 (and in 10 Fam Law at p 84).
42. *Director-General of Social Welfare v B* Somers J, Christchurch, 21 July 1980, M 281/80.
43. Unreported, Cook J, High Court, Christchurch, 16 June 1980, GR 49/80.
44. Guardianship Act 1968, s 23.
45. For the full text see n 31 supra.
46. Unreported, Supreme Court, Auckland, 4 December 1978, M 1338/78.

A summer in Mental Health advocacy in Los Angeles

J B Dawson, BA LLM

The author of this article is a former teaching fellow of the University of Otago. After completing his studies, under a Fulbright Foundation award, for a Master's degree at Harvard University last year, he spent 3 months in Los Angeles working for an organisation that provides legal assistance for the mentally handicapped.

DURING the northern summer of 1981 it was my good fortune to work for three months as a law clerk for Mental Health Advocacy Services in downtown Los Angeles. MHAS is a non-profit, public interest organisation which provides free legal advice and representation to the mentally ill and mentally retarded (known in the US as the developmentally disabled) in the greater Los Angeles area.

Legal Aid agencies

Public interest law in the US takes many forms and may change rapidly over the next few years under the impact of large cuts in federal funding. Representation for indigent criminal offenders is provided in each county by the office of the Public Defender. Mentally handicapped persons involved in criminal and committal proceedings in LA are represented by the LA County Public Defender's office and not by MHAS, which handles exclusively civil matters. Federal funding of Public Defenders is not in jeopardy as all criminal defendants in the US have been found to enjoy a constitutional right to legal representation and if this was not provided by Public Defenders it would have to be provided by the private bar at even greater expense to government.

Legal aid in civil matters, on the other hand, is provided by a network of Legal Services organisations, funded largely by the federal Legal Services Corporation. The Corporation's budget (formerly about $300 million) has been cut by approximately a third in the current financial year. President Reagan's avowed aim is to abolish it by removing its funding entirely. Legal Services organisations come in many shapes and sizes but three general types may be distinguished. First, there are front-line organisations providing a wide range of civil legal aid and representation to individual clients who are unable to afford the services of the private bar. Secondly, there are back-up organisations which do not have their own individual clients but provide research and litigation assistance to front-line organisations in particularly complex or time-consuming cases, and lobby for changes in the law. And, thirdly, there are more specialised organisations, focussing their resources upon a specific problem or clientele, working for example in health law, American Indian law, environmental law, migrant workers' rights, prison reform, death penalty cases etc. MHAS is an organisation of this third type.

MHAS

MHAS is, however, particularly unusual and fortunate in having developed its own self-contained funding system, making it immune to the vagaries of politics and fiscal conservatism. Employing one person to run the scheme, it operates a "beeper" system from the LA County courthouse. The scheme runs on similar lines to the familiar beeper systems used by the medical profession. Rather than hang around the courthouse waiting for his case to come on for hearing, the busy attorney simply turns up at the Court at 9 am, pays $5, picks up a beeper and returns to his office. He knows when to return to Court as he is beeped an hour before his case is due to be heard. An enormous amount of fruitless and frustrating waiting time is prevented and the scheme generates enough revenue to enable MHAS to employ up to 10 full-time staff.

MHAS has been in existence for about five years but has evolved considerably in that time. Originally a special project of the LA County Bar Association, for its first two years the agency operated on a very small scale within Metropolitan State Hospital, a large, secure mental health facility in LA County. It now operates from a modest suite of offices in downtown LA, and gathering its clients from a large number of institutions and halfway houses and from the community at large. Most clients are referred to MHAS by psychiatric social workers or members of the medical profession who recognise that a patient of theirs faces a legal problem. Much effort has been expended by MHAS staff in overcoming the opposition of their medical colleagues, who were initially deeply mistrustful of lawyers interfering in what they viewed as exclusively medical problems. The advocacy programme is now dealing with over 100 individual clients a year, while thousands more benefit indirectly.

To be accepted as a client by MHAS an applicant must be "crazy". (The term "crazy" is used by all mental health professionals in California as it carries less baggage than other possible terms such as "mad" or "insane"). Contrary to what might be expected, this criterion presents few problems as the vast majority of applicants have been involved in the social welfare or mental health systems not once but many times.

Working for MHAS

During the time I worked there, MHAS had a staff of 11 persons, 6 men and 5 women, of whom 4 were full-time and 2 were part-time. The office was presided over by a young attorney of great energy and diplomacy, who is a mental health law veteran although still under 30. He deals with few individual client matters himself but acts as executive director, handling liaison with the local prosecutor and public defender and other organisations working in related fields, pushing for increased funding from any additional source he can dream up, drafting and lobbying for improved legislation, conducting training sessions in mental health law for students and other attorneys, and generally supervising the work of his staff. This staff consists of 3 further full-time attorneys, 4 social workers (2 of whom are part-time), 2 law clerks and an office manager/accountant/typist.

The three attorneys, all women, handle a broad range of civil matters for their crazy clients: health and social welfare issues; housing and employment discrimination; rights to special education for handicapped children; landlord and tenant disputes; and property questions, which arise often owing to the ease with which unethical persons may take advantage of the mentally handicapped. The full-time law clerk is engaged in similar work and on occasions law students have also been employed. Matters involving more mediation and advocacy than legal issues, such as attempting to arrange appropriate housing for clients, are passed on to the two part-time social workers who are completing degrees in social work at a local university (they receive course credits for time spent in the office) and whose salaries are largely paid by the federal government under a work-study programme.

The two full-time social workers deal with more limited and specialised issues. One, who had previously worked in a half-way house for the criminally insane, is funded under a special programme and works exclusively with clients having a dual diagnosis, being both retarded and mentally ill. The other is employed to represent MHAS clients who are applying for a social welfare benefit on the ground of mental disability, and in marshalling the necessary psychiatric reports and documentation. Matters of general interest are discussed at weekly meetings in which all staff participate, and in-house continuing education sessions are regularly conducted.

I was employed by MHAS for three months as a summer law clerk. I had some knowledge of the relevant law as I had studied US constitutional and mental health law while completing an LLM at Harvard and was familiar with American legal materials. Upon arrival in LA I underwent a crash reading course and watched several hours of videotapes to familiarise myself with California's mental health legislation. My work was divided into two parts. During a small part of my time I handled some minor client matters and managed to visit a number of institutions and half-way houses. In one case, for example, a woman had suffered a breakdown and been committed to Metropolitan, where she remained for several months. While she was hospitalised her rent fell into arrears and her landlord cleared her belongings from her flat and arranged for them to be stored in a warehouse. Upon her release she found herself unable to pay the warehouseman's charges and was thus without a flat and unable to regain her possessions. She was soon rehospitalised. This was a fairly typical case.

Primarily, however, I spent my time in the LA County Law Library researching and writing briefs for a number of constitutional/mental health cases in which MHAS is involved. In all cases we worked jointly with other counsel; in two cases with members of the private bar who provided valuable litigation and secretarial assistance on a pro bono basis; in another with the Western Centre on Law and Poverty, a back-up legal services organisation who also provided research and litigation assistance as well as access to Lexis, one of the two major computerised legal research systems. In all the cases we acted as counsel for the plaintiffs, the defendants being the California mental health authorities and the state and local governments.

A case for deinstitutionalisation

One case in particular may have important ramifications and is designed to force the deinstitutionalisation of the Californian mental health system by closing the remaining large, secure mental health facilities and forcing the state and local governments to fund, build and operate alternative, smaller, community-based facilities. The case is based upon a number of legal theories. First, it is argued that the existing hospitals are unnecessarily restrictive of patients' fundamental rights, such as rights to privacy, procreation, communication and association, employment and freedom from unreasonable search and seizure which are guaranteed by the US and California constitutions. Community-based facilities, it is argued, are less restrictive of such rights. Supreme Court decisions establish that a citizen's rights may not be unduly infringed when less restrictive alternative means might be used. It thus follows that large, secure facilities should be closed and community-based facilities opened in order to prevent continuing violations of the state and federal constitutions.

An alternative theory is that involuntarily incarcerated mental patients have a constitutional right to adequate treatment. Large, secure institutions provide little more than custodial care which, in most cases, is grossly inadequate. Their continued operation thus violates constitutional norms in this sense also. We filed an amicus brief with the US Supreme Court on a similar issue in a case which is to be heard this session.

The deinstitutionalisation case had been involved in a deposition and discovery process for several years, and the documentation collected already fills several filing cabinets at the Western Centre. My job was to do the time-consuming legal research necessary to underpin the novel legal theories advanced, the other attorneys being far too busy to spend three months in the library. It will no doubt be several more years before the case is decided or settled. In the meantime the fact that it exists and is going forward places needed pressure on the Californian mental health authorities to continue with the process of deinstitutionalisation they have already partly begun.

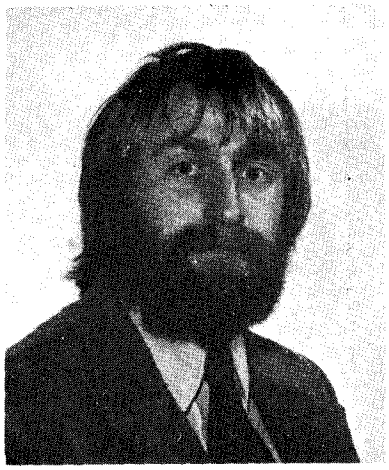
Conclusion

It is, of course, not possible for such constitutional cases to be commenced in New Zealand. This does not mean my summer was wasted. On the contrary, I was able to gain an invaluable inside view of the workings of a legal system based upon a written constitution, to learn at first hand how US public interest law is operated and funded, and to meet many charming and dedicated people struggling to advance the cause of mental health in the face of shockingly adverse political and social conditions.

Limits on the right to claim for unjustified dismissal

G J Anderson, Department of Accountancy, Victoria University of Wellington

The author reviews the ambit of the statutory protection against unjustified dismissal, and discusses certain shortcomings and problems of application disclosed by recent Court decisions.



THE personal grievance procedure in s 117 of the Industrial Relations Act 1973 is a major advance in the legal protection that private sector workers have against being dismissed or disadvantaged by arbitrary or unreasonable employer action.[1] The procedure in s 117 is however not universal in its application and provides no protection for a substantial group of workers.

For a personal grievance to come within s 117 the following criteria must be satisfied:

(a) the grievance must be brought by the worker's union on behalf of the worker (subject to s 117(3A)),
(b) the worker must be covered by an award or collective agreement,
(c) the worker must be a union member,
(d) the worker must be one to whom the Industrial Relations Act applies.[2]

If these criteria are not satisfied a personal grievance cannot be taken, regardless of the merits of the individual case. There is also the additional requirement that the grievance must in fact be a "personal grievance" as defined in s 117.

Union representation

The standard procedure set out in s 117(4) clearly envisages that a worker having a personal grievance must be represented by his union. This is made clear in para (c) which provides that the worker must notify his union representative of the grievance and it is for the union representative "if he considers there is some substance in the personal grievance" to initiate the appropriate procedure. Paragraph (h) which provides for unsettled grievances to be referred to the Arbitration Court gives to the union and not the worker the right to refer the grievance.

The standard procedure is now mitigated to some extent by subs (3A) if there has been a failure to act or act promptly in accordance with the procedure.[3]

This restricted right of individual action is consistent with the scheme of the Industrial Relations Act as a whole. The Act revolves around unions of employers and unions of workers, and although workers may gain personal rights under the Act they must usually rely on either their union or an Inspector of Awards to enforce those rights. The provisions in s 150 are both examples of this although s 128 (suspension of non-striking workers) provides an exception. One reason for this approach is presumably to use the union as a filter for cases that lack merit.

In addition it would seem that s 117 was enacted not to provide job protection but rather to prevent strikes,[4] and it was logical therefore to confine the right to bring a personal grievance action to a trade union.

Award coverage

The most important limitation on s 117 arises from the method chosen to implement the grievance procedure. Section 117(2) provides that:

> Every award or collective agreement shall contain provision for the setting up of effective machinery to deal with personal grievances.

Section 117(3) requires that the provision shall, in the absence of another agreed procedure, be that set out in s 117(4).[5]

The consequence of the decision to incorporate the procedure into individual awards was made clear in *Auckland Freezing Works and Abattoir Employers IUW v Te Kuiti Borough Council* [1977] 1 NZLR 211 (CA). In this case two employees of the defendant had become voluntary members of the plaintiff union although their employment was not covered by an award or collective agreement. The union alleged that the two employees had been unjustifiably dismissed and took a personal grievance action to the Industrial Court. The Industrial Court, on the application of the defendant, stated a case to the Court of Appeal asking the Court to determine if s 117(4) was available to a worker whose employment was not covered by an award or a collective agreement.

The Court of Appeal answered that the procedure in s 117(4) is not available in such a case. The Court held that the procedure did not stand alone as a generally available procedure but was qualified by ss 117(2) and 117(3). When read as a whole it was clear that s 117 did no more than provide a standard procedure to be contained in all awards and collective agreements. The argument of counsel for the plaintiff that s 117(4) was dominant and would apply even where there was no award or collective agreement was rejected.

This decision, while clearly correct, has opened the way for the possibility of technical defences based on the work definition clause in an award. If an employer can establish that the definition of the work covered by an award does not extend to the work done by the particular individual worker, then the employer will have a good defence to a personal grievance complaint. This

possibility was raised in *New Zealand Carpenters etc IUW v Hieber Construction Co Ltd* (1968) Arb Ct 147. The Arbitration Court accepted the argument in principle but did not find it necessary to discuss it at length as it felt the dismissal was justified.

The recent case of *Wellington etc Clerical, Administrative and Related Workers IUW v V V Greenwich* (1980) Arb Ct 257 has however shown that this argument may exclude a grievance from the procedure in s 117. The respondent employer dismissed three workers the day after they joined the applicant union. The Court found that the workers in question had been dismissed because they joined the union and that the dismissals were "quite unjustified". The employer argued however that the workers' claim could not succeed as the definition of "clerical work" in the award (presumably the New Zealand Clerical Workers Award) did not cover the categories of work done by the dismissed workers. The work in question was basically the interviewing of job applicants, arranging job interviews, and soliciting job vacancies from employers. The Court accepted the employer's evidence that these functions occupied about 80 percent of the workers' time (the other 20 percent being clerical work as defined in the award). The definition of clerical work in the award did not however mention these classes of work. The words "employed wholly or substantially" in clerical work were held to mean that the small amount of time spent doing strict clerical work was not sufficient to bring the workers within the coverage of the award.

This being so the Court was forced to dismiss the case as there was no jurisdiction to consider it.

Some additional comments should be made on this decision.

First, the union's membership clause would seem to have covered the workers in question. The majority of the Court thought this "might well" be the case and Sir Leonard Hadley in a separate comment took the view that it did in fact do so. The lesson of the case for a union would seem to be to ensure that the award (or awards) negotiated by the union cover all work categories covered by the union's membership clause. This may however involve drafting difficulties so as to avoid demarcation problems if a general formula is used,[6] or the danger of missing something if specific and detailed job descriptions are used.

The second comment is that this case would seem to come within s 150(1)(e) of the Industrial Relations Act which relates to the dismissal of a worker who "was a member of any union" within the 12 months before his dismissal. The Arbitration Court has since held in an interim decision, that it has jurisdiction under s 150 (*Wellington etc Clerical, Administrative and Related Worker IUW v V V Greenwich* (1981) Arb Ct 93).

The need for award coverage will exclude workers who earn a salary above the award maximum and are excluded from its coverage. Such clauses tend to be of the form "nothing in this award shall apply to workers in receipt of over $10,000 pa excluding overtime and bonuses". As the award does not apply to such workers they are not protected by s 117.[7]

Such a clause does present some problems as its effect may be that a worker is protected one week and not the next depending on changes in the award and individual salary changes. There is in addition the problem of calculating the annual salary, particularly where the worker is paid a weekly wage or the salary has been increased during the previous year. Should the Court take the weekly wage and multiply by 52 or look at actual earnings? In *Wilson's* case the former course was adopted but employment had not in fact begun.

A further problem that could arise is where a worker on notice comes within the award coverage during the period of notice.

Union membership

In addition to being covered by an award it seems that a complainant must also be a member of the relevant union. The Court of Appeal in the *Auckland Freezing Works etc* case (supra, at 212) stated:

> It seems clear particularly from paras (c) and (h) that the standard procedure . . . is only available to a worker who is a member of a union.

Paragraphs (c) and (h) of s 117(4) refer to "his union" and "the worker's union" which would seem to provide clear support for the Court of Appeal's view.

The Arbitration Court in *Muir v Southland Farmers' Co-operative Association Ltd* (1979) Arb Ct 49 had to decide whether union membership was a prerequisite to an individual action under s 117(3A) and held that it was. As the applicant had never been a union member his application for leave to proceed was dismissed. This decision was based on the phrase "failure on the part of the worker's union" in s 117(3A). The Court held that the reference to "his union" must mean the union to which the worker belongs. The Court in fact went further and noted that because of the unqualified preference clause "his union" would probably refer to the union to which the worker ought to have belonged.

The Arbitration Court did however allow one possible exception, and that is that "his union" could refer to a union prepared to represent a worker whether he is a member or not. This view may however be incorrect. It does not accord with the opinion of the Court of Appeal and would seem to strain the meaning of the phrases "the worker's union" and "his union". The exception was however expressed as a "possibility" only and was obiter in that if a union was prepared to represent a non-member subs (3A) would not be used.

The problem of non-membership may however be overcome if the union was prepared to act. The worker would simply join the union (a procedure which in any case would probably be required by the union before it took action). Section 117 makes no reference to union membership until para (c) which relates to the initial union involvement in the procedure. The Court in *Madden v Peak, Rogers & Co* (1981) Arb Ct 129 held that the union membership requirement had been fulfilled where the applicant, who was not a union member at the time of dismissal, had become a member at the time para (c) was invoked.

The requirement of union membership for both ss 117(3A) and 117(4) does raise some problems. The most important of these is the possibility that a number of people bound by an award may not be union members. These include conscientious objectors,[8] certain occupational groups, (s 112A) and persons under 18 years of age (s 98). Such persons are however still bound by the provisions of any award or collective agreement if "employed by any employer on whom the agreement is binding in any employment to which the agreement relates".[9] The same situation could also apply in relation to any award that did not contain an unqualified preference clause.

Members of such groups (presumably excepting conscientious objectors) can become voluntary union

members and in such a case would still be entitled to rely on s 117. If they did not do so then they could not seek leave under subs (3A) and would have to rely on the union being prepared to accept their membership and act for them. The Arbitration Court in *Muir* seemed to accept that a union had no obligation to act for a non-member.

An interesting possibility is however opened up by s 104, which gives workers the right to join a union. A worker could presumably use this right to gain membership and then, if the union refused to act, proceed under s 117(3A). In *Madden* it was accepted that a dismissed worker who was "intending to be employed" in the industry had sufficient status for union membership and that "intending" had a wider meaning than "about to be employed", which was the interpretation suggested by counsel for the respondent. The possibility of using s 104 did not however arise in *Madden* as the Court held that the union in accepting Madden's subscription had given him "sufficient membership status" and that an attempt to return his money some time later did not affect this status. An application under subs (3A) was therefore allowed. Whether the Court would be sympathetic to an action based on s 104 (or even, in a case similar to *Madden*, where a worker had failed to join the union over a lengthy period) is questionable. Madden had only been employed 21 days when dismissed and could not be really regarded as "freeloading" on the union.

The Arbitration Court was clearly aware of the implications of its decision in *Muir* but nevertheless felt constrained to hold as it did and pointed out that the scheme of the Industrial Relations Act tended to support the decision, its operation being based on and dependent on the existence of unions.

The requirement of union membership also raises the possibility of a defence based on an argument that a union's membership rule does not cover the worker in question. If this were so the union would have no jurisdiction to represent the worker in a grievance procedure. It may in fact happen that the award itself is ultra vires as regards any provisions applying to workers not covered by the union's membership rule. This conclusion was reached in *Inspector of Awards v Ali-Craft Boats (Taumarunui) Ltd* (1978) Arb Ct 49, where it was held that the wages provisions in an award were ultra vires as the union which had negotiated them had no membership rule to cover the class of worker concerned. The Court held that "a union cannot negotiate on behalf of workers who are not covered by its membership rule." The same reasoning presumably applies to representation of such workers in other matters.

Personal grievance

The term "personal grievance" is a statutory one and may be significant for two reasons. First, if a grievance is not "personal" there may be no jurisdiction for it to be heard under s 117. Second, if there is no "grievance" then the case must be dismissed.

A "personal grievance" is defined in s 117(1) as:

> Any grievance that a worker may have against his employer because of a claim that he had been unjustifiably dismissed, or that other action by the employer (not being an action of a kind applicable generally to workers of the same class employed by the employer) affects his employment to his disadvantage.

This definition will delimit the scope of s 117. If there is no personal grievance the procedure does not apply. Normally this situation would arise when the grievance has a significance extending to workers generally and there is no "personal" element involved. In such a case the appropriate procedure is that in s 116, which provides for the settlement of disputes of rights. Personal grievances are specifically excluded by para (1)(b) from the scope of s 116.

This point was raised by the Industrial Court in *Te Miha v Dunlop (NZ) Ltd* (1975) 75 BA 8829, where the Court said, obiter, that the grievance procedure was inappropriate as the dispute at issue involved collective action rather than a personal grievance. The same point was taken in *Hori* (op cit) at 39. In both cases the Court did not rely on this argument in reaching a decision but rather decided the cases on the merits of the dismissals. In both cases the applicants were bringing a test case to determine the validity of dismissals arising out of industrial action.

There is however some scope for using s 117 in the case of a collective action and that is where an individual worker is disadvantaged in comparison to his fellows. In this situation the grievance complained of would not be action "of a kind applicable generally to workers" as it was in the *Te Miha* and *Hori* cases.

The type of situation that can arise is illustrated by *Doyle v Dunlop (NZ) Ltd* (1975) 75 BA 2883. Doyle was dismissed for refusing an order to do certain work, the refusal being due to instructions from his union. The Court accepted that Doyle was used by management to provoke a confrontation with the union. After the resulting strike it would seem that all workers were to be reinstated. Doyle however was re-employed and as a consequence lost seniority and some pay. The Court ordered reinstatement without loss of seniority and with compensation for lost pay.

As noted above, the s 116 procedure cannot be used for a personal grievance. The Court in *Parisian Coat Manufacturing Co v Auckland Clerical etc IUW* (1976) 76 BA 55 heard a personal grievance under s 116 but warned that if the point had been raised it would have had to refuse to hear the application.

The second issue that arises from the definition of "personal grievance" is that the worker must in fact have a grievance. This may be a dismissal or an action that "affects (the worker's) employment to his disadvantage". In most situations the dismissal case will create few problems. There are however cases where the issue may not be so straightforward. In *Wilson's* case (supra note 7) the Court held that a dismissal must relate to employment and that where a contract is terminated prior to commencement of actual employment there is no claim under s 117 even though there may be a contractual remedy available.

When does dismissal occur?

A more important problem, and one with considerable practical implications, is to decide when dismissal occurs. The importance of this decision is illustrated by *Auckland Hotel etc IUW v King Size Burgers* (1980) Arb Ct 199. The worker in this case was given seven days notice but chose to leave immediately. The Court held that there had not been a dismissal but rather the employment had been terminated by mutual consent or had been abandoned. This period was longer than that in the award, which provided for two days notice. The award period would normally be the contractual period of notice and an employer could not insist on a longer period. Although the decision did not raise this point it could be relevant if the

award provided one hour's notice.

The implication of this decision is that a worker who fails to work out the period of notice may lose his remedies for unjustified dismissal unless the employer's conduct amounts to a constructive dismissal[10] entitling the worker to leave immediately.[11] Constructive dismissal is however an undeveloped concept in New Zealand and if the conduct complained of, while unreasonable, is not sufficient to amount to a repudiation of the contract the worker may find that there has been no constructive dismissal.[12]

Another possibility is to separate the dismissal from the termination of the contract. If the giving of notice is treated as dismissal then it will precede the worker's action and the right of action will be maintained, even though the worker's conduct may well influence the compensation a Court would be prepared to award. The word "dismissal" is an ambiguous one and can be used to describe either the giving of notice or actual termination of the contract.[13] The Court in *King Size Burgers* took the view that dismissal for the purposes of s 117 relates to the manner of termination of the contract. While this seems to be the most obvious solution it may work injustices and it is arguable that the giving of notice should be taken as the dismissal. The giving of notice determines the moment the contract will be terminated and is irrevocable by the employer's unilateral action.

Grievances not involving dismissal

The Court has held that some grievances, not involving dismissal, do not come within s 177. This was held to be the case with a grievance over non-promotion in *Auckland Regional Authority Officers Industrial Agreement — Application for Interpretation* (1974) 74 BA 541, where the Court said:

> It appears to us that if the legislature had intended to embrace the non-promotion complaint it would have said so in specific language. As we have endeavoured to show, the non-promotion complaint is essentially different from the ordinary sort of employer/employee dispute and we have said also that the non-promotion complaint requires special procedures. We are of the opinion that s 117 is not aimed at grievances relating to promotion appointments.

This case has some unsatisfactory aspects. The decision appears to be a policy one as the language of s 117(1) does not seem to necessarily exclude a case of non-promotion. The Court however probably had a legitimate concern to avoid becoming a promotion appeal authority, which could among other problems involve reviewing the merits of all applicants. It would nevertheless seem possible for the Court to ensure that normal promotion practice had been followed and an applicant given a fair hearing. Indeed if the Court had adopted this view the case could have been disposed of on its facts as the officer in question had already exhausted an internal appeals procedure. The decision may also contain an unarticulated policy element that the Court should not interfere in matters which it would see as coming within the area of management prerogative.

In another case *Northern (except Gisborne) Butchers etc IUW v Wilson Meats Ltd* (1980) Arb Ct 149, a casual worker claimed a personal grievance in that there had been a failure to offer her full-time work. There was a conflict of evidence as to whether or not the employer had offered a change in status as part of the contract of employment. The Court did not seek to resolve this conflict but instead said that there was no "obligation *under the award* to offer full time . . . work" (emphasis added).

The implication in the decision is that only an award benefit will justify a personal grievance claim and not a benefit based on the contract of employment. If this is a correct interpretation, then it would result in a considerable limitation on the scope of the grievance procedure. The reasoning of the Court in this case is however brief, consisting of only one sentence of which the quote above is the most material part. It would be difficult to conclude from this that a non-award grievance is excluded, but nevertheless the possibility would seem to have been opened up. There is no indication in the decision that the contract of employment was considered, but on the other hand there was no discussion of or justification for confining grievances to award-based grievances.

The Court has also taken the view that a grievance must involve some material detriment. In *New Zealand Shipping Officers IUW v Union Steam Ship Co Ltd*[14] the claimant had suffered a loss of status as a result of internal restructuring, but no loss of pay or other benefits. The Court concluded:

> In view of the fact that he has suffered no reduction in . . . material respects we are not prepared to hold that he does have a personal grievance of the type contemplated . . .

Actions by an individual — subsection (3A)

Section 117 was amended in 1976[15] to allow an individual worker a limited right to take a personal grievance on his own initiative. This right is subject to the general constraints on s 117 as a whole which were discussed above[16] but in addition requires the worker to show that he

> is unable to have his grievance dealt with because of a failure on the part of the worker's union or the employer or any other person to act promptly in accordance with the procedure.

The problem that is most likely to arise is whether or not the worker's union has failed to act. Where an employer refuses to accept or use the standard procedure the case is probably reasonably clear.[17] The difficulties arise where there is some limited action by the union which fails to satisfy the worker.

The approach of the Court in applications for leave is not entirely clear. Where a union takes little or no action leave will generally be given. For example where a union undertook to set up a grievance committee but did nothing for four months leave was given,[18] as it was another case where the union "declined to assist in any way".[19] The Court may also be more inclined to grant leave where there is some suspicion that the union or union official may have acted improperly or inappropriately — where perhaps the official is an employee or has some connection with the employer[20]. The Court is also prepared to grant leave where the union takes into account policy considerations that do not relate to the merits of the individual case, even when the Court feels the union is in an "invidious position".[21]

The more usual case, however, is when the union takes some action but fails to satisfy the applicant. The clearest statement of the Court's attitude is found in *Jones v Home Bay Cottage* (1980) Arb Ct 61. The Court stated:

> If a union takes up a matter, investigates and then either at the point of subs (4)(c) or (4)(d) decides to proceed no further, then it can be

argued that the union has not failed to act nor to act promptly. We prefer, however, the view that 'to act' is a continuing concept and that if at the points in subs (4)(c) or (d) the union ceases to act when, on the facts known to the union, it would be unreasonable to cease to act, then there could be a failure on the part of the union to act and the aggrieved worker may move this Court for leave to proceed. The circumstances surrounding any allegation of a failure to act during the procedures must therefore be examined. The Court in accepting this interpretation of s 117 approaches it on the basis of the purpose of the statute set out in its long title, the specific purposes of s 117, and gives to both these matters a fair, large and liberal interpretation. The purpose of subs (3A) is remedial.

The Court in *Hennessy v Auckland City Council* (1981) Arb Ct 213 made it clear that where the union fails to pursue a case which the Court regards as reasonable, leave to proceed under subs (3A) will be granted. In that case reinstatement and payment of lost wages were awarded and the Court made it clear that the union's actions were unsatisfactory.

This approach must involve the Court in hearing at least some evidence as to the facts so as to determine whether the union's action is reasonable. This may cause some confusion between the refusal of leave and a decision on the merits of the case. The Court in fact does seem to review the evidence as to the merits in some detail in most cases.

Where an applicant has a reasonable case it is probable that the minimum action required may be the convening of a grievance committee. If however a grievance were disposed of at that stage the Court would be unlikely to intervene, as to do so would allow an indirect appeal contrary to subs (4)(g) which allows an appeal only where the grievance is "not settled" at the committee level.

The Court has however made it clear that the union's action does not have to be acceptable to the worker as long as the union has made a proper investigation of a complaint and decided it has no merit. The union's decision not to pursue a claim to committee level does not mean it has failed to act. The Court concluded in one case;

> . . . the union took action and took it promptly and no impropriety in its actions has been shown. In these circumstances there are no grounds for the Court to grant leave under subs (3A) . . .[22]

It should be added however that where there seems to be any doubt at all as to the union's action the Court seems to prefer to give the applicant the benefit of the doubt and reach a decision on the merits.[23]

Conclusion

While s 117 has greatly increased the security of workers from arbitrary or capricious employer action its scope has been confined to a limited range of workers. While this may be acceptable if it is viewed purely as a union-management disputes procedure, if a wider view is taken and it is seen as a job protection measure then the coverage should logically be extended to a greater range of employees.

Section 117 has also raised some internal legal issues. In particular the concept of constructive dismissal is still not developed in New Zealand law and may well cause problems in future.

It may be time that employment protection legislation was removed from the ambit of individual awards and given a wider range of coverage and a sounder legal base. Such a development would accord with overseas trends and ILO standards[24] as well as following other New Zealand precedents such as the Annual Holidays Act 1944 and the Maternity Leave and Employment Protection Act 1980. At the moment state employees and award-covered workers enjoy reasonable protection. There seems no logical reason why other employees should be excluded.

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1. For comment on the remedies available see Anderson G J, *An Examination of Section 117 of the Industrial Relations Act 1973*, Industrial Relations Research Monograph No 4, Victoria University (1978) pp 21-35 and Mazengarb and others *Industrial Law*, Butterworths Wellington (looseleaf) at pp 127-129.
2. Crown employees, who by agreement are covered by award conditions, are excluded as a result of s 128. See *Hori v NZ Forest Service* (1978) Arb Ct 49 at 51-52.
3. Subsection (3A) is discussed below.
4. See the introduction speech by Rt Hon J R Marshall NZ Parl Deb Vol 365 (1970) p 3127.
5. For a comment on alternative procedures adopted see Anderson op cit pp 16-21.
6. Even the reasonably detailed definition in the Clerical Workers Award contains provisions to avoid two possible demarcation situations.
7. *See Auckland Clerical etc IUW v Dr Jennifer Wilson* (1980) Arb Ct 357.
8. Industrial Relations Act, ss 105, 106, 107.
9. Ibid s 82(8), extended to awards by s 89(2).
10. The Court seemed to accept the notion of constructive dismissal in *Whimp v National Insurance Co of NZ Ltd* (1978) Arb Ct 313 but did not have reason to discuss the problem. See also *Wellington Clerical Workers IUW v Barraud & Abraham Ltd* (1970) 70 BA 347. On the difficulties raised by this question in the UK, see Elias P *Unravelling the Concept of Dismissal — II* (1978) 7 Industrial Law Journal 100.
11. The UK legislation specifically allows an employee to require the employer to reduce the period of notice: Employment Protection (Consolidation) Act 1978, s 55(3).
12. *Western Excavating (ECC) Ltd v Sharp* [1978] 1 All ER 713.
13. The UK legislation allows an employee, once notice has been given, to terminate the contract on a shorter period of notice without losing his remedies for unfair dismissal.
14. (1978) Arb Ct 19. See also *Fawcett v Heathcote County Council* (1980) Arb Ct 53.
15. Industrial Relation Amendment Act (No 2) 1976, s 19 inserted subs (3A).
16. See especially *Muir v Southland Farmers Co-operative Association Ltd*, supra. See also *Nichol v NZ Musicians Union* (1980) Arb Ct 39 where the applicant was proceeding (in unusual circumstances) against his own union. Leave was refused because no attempt to implement a grievance procedure was made.
17. *Dee v Kensington, Haynes and White* (1977) Ind Ct 67 and see Szakats *Trade Unions and the Legal Profession — or Rule of Law and Unjustifiable Dismissal* (1977) NZLF 319.
18. *McAuley v R Hannah & Co Ltd* (1979) Arb Ct 287.
19. *Vial v St Georges Private Hospital* (1979) Arb Ct 53.
20. *Vial's* case: infra (union delegate worked in same department as applicant); *Tangira v Tolley Industries Ltd* 1980 Arb Ct 117 (union secretary an ex-employee). *Upton v Oneroa-Surfdale Transport Ltd* (1979) Arb Ct 77 (union's decision may have been influenced by the worker's unpopularity with his co-workers). See also *Bowley and others v G R Stevens & Co Ltd* (1980) Arb Ct 333 where a non-worker dispute contributed to the dismissal. Leave was refused under subs (3A). See also *Sutherland v Combustion Engineering Robert Stone Ltd* (1981) Arb Ct 267 where the union refused to act after a

site meeting from which the applicant was excluded.
21. *Keir v St Johns Ambulance Association* (1981) Arb Ct 31.
22. *Scurrah v Auckland Hospital Board* (1980) Arb Ct 15.
23. See *Baker v Northern Publishing Co Ltd* (1980) Arb Ct 241.
24. ILO Recommendation No 119 Concerning Termination of Employment at the Initiative of the Employer (1963).

Lying to a Police Officer

Dr Geoffrey A Flick, Barrister at Law and
Director of Research, Administrative Review Council, Canberra

THE recent decision of Blackburn CJ sitting as the Supreme Court of the Australian Capital Territory in *Tankey v Smith* (1981) 36 ACTR 19 asserts a proposition long established in New Zealand. Blackburn CJ held that a youth had committed the offence of obstructing a police officer in the execution of his duties contrary to s 64(1) of the Australian Federal Police Act 1979 when he gave a false answer to a police officer's question as to who had been driving a motor vehicle which had been involved in an accident.

A similar result had been reached by the Supreme Court of New Zealand in 1949.[1]

In reaching this conclusion Blackburn CJ asserted the following propositions of law:

— the offence of obstruction is not committed simply by failing to answer questions put by police[2]
— a failure to answer questions may amount to the offence of misprision of felony[3]
— if a defendant does some positive act which hinders the police in the sense that it delays them in, or prevents them from, proceeding with the execution of their duty, he will be guilty of an offence under s 64(1)

This last proposition, perhaps, requires greater elaboration. Obstruction means any conduct that actually makes it more difficult for the police to carry out their duties.[4] In addition, it is necessary for that conduct to lead to some appreciable obstruction to or interference with the performance of the duty and it is a question of fact and degree whether in the circumstances of a particular case the obstruction or interference was appreciable.[5] It is not necessary, however, for the prosecution to prove that the conduct of the accused led to a complete frustration of the police officer's endeavours and a conviction has therefore been upheld where an attempt by the defendants to prevent the police from arresting a colleague was unsuccessful.[6]

Whilst upholding the decision of the Court of Petty Session, Blackburn CJ expressly refrained from endorsing the proposition of that Court that mere failure to co-operate with the police amounts in law to obstruction. Such a proposition is clearly contrary to established law and is manifestly incorrect.[7]

The significance of the decision by Blackburn CJ, therefore, is the proposition now asserted by an Australian Court that providing false information to the police constitutes an offence. The qualification of the Scottish Courts that obstruction involves some "physical feature" was not referred to.[8] In addition, the following statement of His Honour (at p 21) indicates two limitations to his basic proposition:

> To tell a lie in answer to a question designed to elicit information which the questioner has a duty to elicit must, in the ordinary case, be to obstruct the questioner in the execution of his duty. Two cases come to mind which, possibly, are exceptions: where the questioner knows that the answer is false, and where the falsity is in an immaterial respect. Of these possible exceptions I say no more; but otherwise it is not easy to imagine a case in which a deliberate lie in such circumstances would not be an offence against the section.

1. *Mathews v Dwan* [1949] NZLR 1037. See also: *Bastable v Little* [1907] 1 KB 59, at 63.
2. *Rice v Connolly* [1966] 2 QB 414.
3. *Sykes v DPP* [1962] AC 528.
4. *Hinchcliffe v Sheldon* [1955] 1 WLR 1207, at 1209; *Rive v Connolly* [1966] 2 QB at 419.
5. *Plunkett v Kroemer* [1934] SASR 124, at 127-28. Contrast, *R v Green* (1861) 5 Cox CC 441.
6. Eg *R v Tortolano* (1975) 28 CCC (2d) 562.
7. See generally Flick *Civil Liberties in Australia* at 29-40 (1981).
8. *Curlett v M'Kechnie* (1938) SC (J) 176.

The startling reality and Ualesi: a rejoinder

F M Brookfield, Associate Professor of Law, University of Auckland

MR David G McGee has written ([1981] NZLJ 456) to defend the judgment of Quilliam J in *Ualesi v Ministry of Transport* [1980] 1 NZLR 575 against the criticisms of Mr P A Joseph ("Ministerial Appointments — Still the "Startling Reality" [1981] NZLJ 390). But, with respect, Mr McGee's defence does not succeed and his arguments must fall virtually at the first attack. I say at once that my own views, which by the time this note is published will have appeared fully in the pages of the New Zealand Universities Law Review, are on the main issue substantially in accord with those of Mr Joseph. He and I agree that the House of Representatives is, like the House of Commons, a body which ceases to exist at the expiry of the statutory life of Parliament or on prior dissolution. We agree that the present New Zealand practice, by which a new Ministry is appointed about 14 days after a General Election, is in breach of the Civil List legislation (see now s 9 of the Civil List Act 1979) because at that time the appointees are not members of Parliament, there being no House of Representatives then in existence. To the contrary, Mr McGee, in support of Quilliam J, argues that the House of Representatives is continuously in existence, having been "given life" by s 32 of the New Zealand Constitution Act 1852 of the United Kingdom Parliament ever since that Act came into force on 17 January 1853.

Mr McGee warns against assuming that terms like "summon", "prorogue" and "dissolve", used in the Constitution Act, "have exactly the same meaning and effect in New Zealand as they do in the different constitutional system of the United Kingdom". Mr McGee's own view is that in New Zealand dissolution is merely "the termination by the Crown of the Parliamentary tenure of all current members of Parliament, as opposed to the termination of that tenure by effluxion of time under s 12 of the Electoral Act". Whether furnished with members or thus emptied of them, the House (in his as in Quilliam J's view) remains continuously in existence.

In one respect, Mr McGee is right. The New Zealand General Assembly, like other colonial legislatures, was not a complete reproduction of the imperial Parliament. Neither Mr Joseph nor I would argue that it was. The United Kingdom Parliament is a High Court, but a colonial legislature like our own was not — is not. Hence the need for s 242 of the Legislature Act 1908 (to which Mr McGee refers) and its predecessor in ss 4 and 5 of the Parliamentary Privileges Act 1865, to obtain generally for the House of Representatives the privileges enjoyed by the House of Commons as part of the High Court of Parliament. (Cf *Kielley v Carson* (1843) 4 Moo PCC 63 at p 89; 13 ER 225 at p 235). But to the extent that, sometimes by the prerogative but in later imperial times usually by or under Act in Parliament, the Crown provided for representative government in the colonies, it did reproduce in essentials of organisation the United Kingdom Parliament in the latter's capacity as a Legislative Assembly — though with limited powers and the substitution of a legislative council or similar body for the House of Lords.

But whether as High Court, or as a Legislative Assembly, the United Kingdom Parliament has not existed continuously. There has been a *succession* of Parliaments and, consequently, of Houses of Commons, each called into existence for the time being by the Crown. If Mr McGee thinks to show that the position is essentially any different in New Zealand, the onus on him is a heavy one and, with respect, he does not come anywhere near discharging it. On the contrary, the present statute law confirms the position shown in the New Zealand Constitution Act 1852 as originally enacted; and that position is in relevant respects the same as the British. It is difficult to believe that Mr McGee has read s 32 of the New Zealand Constitution Act in the whole of its original context. Certainly it provided that —

> There shall be within the Colony of New Zealand a General Assembly, to consist of the Governor, a Legislative Council, and a House of Representatives.

But the section did not bring into existence either the Council or the House. Section 33, clearly prospective in its operation, provided "for constituting the Legislative Council". Similarly s 40, in relation to the House of Representatives:

> XL. *For the Purpose of constituting the House of Representatives* of New Zealand it shall be lawful for the Governor, within the Time hereinafter mentioned, *and thereafter from Time to Time* as Occasion shall require, by Proclamation in Her Majesty's Name, *to summon* and call together a House of Representatives in and for New Zealand, such House of Representatives to consist of such Number of Members, not more than Forty-two nor less than Twenty-four, as the Governor shall by Proclamation in that Behalf direct and appoint; *and every such House of Representatives shall, unless the General Assembly shall be sooner dissolved, continue for the Period of Five Years from the Day of the Return of the Writs for choosing such House, and no longer.*

This is the first forerunner of the present s 12 of the Electoral Act 1956 which provides as follows:

> 12. *The House of Representatives, as existing on the date of the commencement of this Act, and every House of Representatives* elected after that date, shall, unless Parliament is sooner dissolved, continue for a period of 3 years, computed from the day fixed for the return of the writs issued for the general election of members of *that House of Representatives*, and no longer.

The emphasised words make the point. The legislation refers unmistakably to a succession of Houses of Representatives as of General Assemblies. The first of the former surely did not come into existence until constituted by the Governor under s 40 of the Act of 1852.

This raises the question of the effect of dissolution on the Council. There is no selective power of dissolution in New Zealand. The Governor-General dissolves the General Assembly, not the House of Representatives, as he does,

for example in Australia (s 5 of the Australian Constitution.) In the case of double dissolution he has power to dissolve "the Senate and the House of Representatives" — s 57 — the dissolution is not of the Federal Parliament. If the effect of the dissolution of the General Assembly is to destroy the House of Representatives as an institution, did it equally destroy the Council (and the Governor)? That it did not destroy the Council is clearly implicit in ss 33 and 34 of the Constitution Act. Members held office, at first for life, later for seven years, and were not appointed to a different Council following each election. Dissolution of the General Assembly then does not inherently involve the destruction of the individual houses of the legislature. What s 33 was doing when it provided for the "constituting" of the Council was, it is submitted, providing for the making up of the Council's membership (by appointment), not bringing it into existence. Similarly s 40 was providing for the periodical making up of the membership (the constituting) of the House of Representatives (by providing for an election), not for the periodical bringing of it into existence as an institution.

This aspect of dissolution in New Zealand, that it is in its own terms a power to dissolve the General Assembly, and that dissolution of the umbrella body does not necessarily entail dissolution of its component parts (although it sets in train the electoral system) was remarked on by Quilliam J, and with respect I consider that it is significant, especially when one asks what is the present authority for the House's existence.

Finally, Professor Brookfield refers to the Crown's advisers ignoring the cogent criticisms of Quilliam J's judgment. I entered upon this question, following Mr Joseph's article, as an interested parliamentary lawyer. In my official position I owe duties to the House of Representatives as an officer of that House, in other words to a different part of the General Assembly from the Crown. The "Crown's advisers" may well be able to advance a better defence than I, but I would not like it to be thought that my contribution represents an attempted justification by "the Crown's advisers" of Quilliam J's decision.

Section 40 is the forerunner not only of the present s 12 of the Electoral Act 1956, as Professor Brookfield says, but most of it is also the forerunner of s 11 of that Act (s 40 having been repealed in 1902 and replaced in an amended form by a provision which eventually became s 3(1) and (2) of the Electoral Act 1927, subs (1) of which was completely re-drafted in 1956 as the present s 11). Section 11 reads "The House of Representatives constituted as part of the General Assembly by section 32 of the New Zealand Constitution Act 1852 shall consist of . . ." (and then follows a description of its membership). This is clearly not an establishing provision, it is directed to identifying the body to which it is referring, and describing its membership. Section 12 of the Electoral Act (which Professor Brookfield quotes) refers to an already existing House of Representatives and does not itself create the institution. Its subsequent reference to the length of time the House is to run must depend upon more fundamental provisions bringing the House into existence; provisions which in Professor Brookfield's contention were formerly contained in the first part of s 40 of the Constitution Act, but which are not in its successors. If s 32 of the Constitution Act does not create the House of Representatives there is no provision in force at the moment which does. If, as Professor Brookfield thinks, the original s 40 was the provision which enabled the Governor to establish the House periodically, he must have lost that power by the emasculation of s 40's successor in 1956. (One would also have expected the Governor's Proclamations after 1902 to have referred to the Electoral Acts as the specific authority for the summoning of the House of Representatives whereas they continued to refer to the Constitution Act.) If the House is not already a statutory creature, investing the original s 40 with the significance Professor Brookfield contends for means that there is now no statutory power to call it into existence.

Professor Brookfield refers also to s 33 of the Constitution Act which provided for "constituting the Legislative Council". In Professor Brookfield's view, it was the Governor, acting under that section who brought the Legislative Council into existence.

A comparison of the New Zealand provisions with those in the Septennial Act 1715 of the Parliament of Great Britain, upon which the former are clearly based, leaves no doubt that in this respect the New Zealand General Assembly follows the imperial model. There is consequently no ground whatever for suggesting that Parliamentary dissolution does not have the same effect in New Zealand as in the United Kingdom. It does indeed, as Mr McGee says of the New Zealand position, terminate the tenure of members of Parliament; but it does so by dissolving the particular Parliament or General Assembly and thus bringing to an end the elected House. The defects in Mr McGee's argument are that he ignores not only the relevant constitutional background but the clear terms of s 12 of the Electoral Act and its predecessors.

It is of course fairly clear why, with somewhat strained reasoning, Quilliam J and now Mr McGee have sought to keep the House of Representatives in being as a continuing institution. What if all the successive Ministries since 1950 have been appointed in breach of the Civil List legislation because appointed when the House of Representatives did not exist? But, fortunately, the de facto doctrine, briefly discussed in Mr Joseph's original article ([1981] NZLJ 26) and in my note on *Ualesi's* case in the New Zealand Universities Law Review, would save the country from the constitutional and administrative chaos that, some might feel, could result from such dire events. In particular, the doctrine would have saved the Transport (Breath Tests) Notice 1978 under attack in that case.

Which is not to say that the Crown's advisers should ignore the cogent criticism to which Quilliam J's judgment has been subjected. At all events a better defence of that judgment is required than has so far been provided.

We invited Mr D G McKee to comment on the above article, and he has written as follows:

First, let me say I do not accept that the onus of showing that the position as to a succession of Parliaments in the United Kingdom is different in New Zealand rests with me. One might be forgiven for thinking that a proposition which leads to the conclusion that most Ministers of the Crown have been appointed illegally since 1950, that despite a closely-fought election a few months ago New Zealand may not yet have any members of Parliament, and which was itself rejected in a recent High Court decision, leaves the onus on its proponents rather than the reverse. If this is the present position then Mr Joseph's reality is indeed startling.

Professor Brookfield believes that ss 33 and 40 of the Constitution Act were the authority for the establishment of the two Chambers. If so, what has since become of these enabling provisions? *(continued on p 80)*

Tracing

Professor Richard Sutton

The author is Dean of the Faculty of Law at the University of Otago. He was educated at Auckland and Harvard Law Schools, and is a member of the Property Law and Equity Law Reform Committee.

The distinguished paper below is reproduced by kind permission of the Conference Committee of the New Zealand Law Society's Triennial Conference. When presented in April 1981 it was entitled "Creditors' Rights".

Introduction

WHEN, by mistake, I pay you money which I do not owe you, who is the owner of the money? In many respects, of course, you become the owner: you pay it into your bank account, you spend it, save it, do what you will with it. But that is not decisive. It now seems that, as between you and me, I am really the beneficial owner, and you have no more than the outward trappings of ownership. This is the conclusion we must draw from the recent decision of Goulding J in *Chase Manhattan BNA v Israel British Bank Ltd*,[1] which points the way towards a greatly expanded view of the "proprietary" claims available against a bankrupt estate or company in liquidation.

What is "tracing"?

As long as you the recipient remain solvent, questions of ownership are seldom relevant. Having received the money because of the mistake, you are liable to pay back a corresponding sum.[2] If you fail to pay, I can recover judgment for that sum in an action in quasi-contract, the modern descendant of the old count for money had and received to the plaintiff's use.[3] However, if you have become insolvent or bankrupt since receiving the money, my rights of ownership may make all the difference. Instead of treating my claim as one for a provable debt, I will want to treat it as a proprietary claim for the funds you have received, and of which (I hope) you are still in possession. I thus obtain, through my claim of ownership in an identified asset, preference over all the payee's unsecured creditors.

This remedy is called a "tracing remedy". I can "trace" my money through the various transformations it undergoes in your hands — first, as the banknote or cheque I hand over; then, the credit you establish in your bank account when you bank it; then, the property you buy with those particular funds. This paper deals mainly with "equitable tracing", because the process is basically equitable in character and was recognised as such in the *Chase Manhattan* case. In legal form, and in your dealings with the outside world, you are the owner of the transformed property, not I. My proprietorship is much more limited, being enforceable only against you and those, such as your assignee in bankruptcy, who are privy to your dealings. It is the kind of right that, before the fusion of the Courts of Law and Equity, one would expect to find was recognised principally in the Courts of Equity. However, the position is complicated because, although that was clearly the case, Courts of common law also came to recognise similar rights and to shape their own remedies to achieve those results which Courts of Equity could achieve directly. As we shall see, this has led some theorists to maintain that there is such a thing as "common law tracing", which operates independently of the principles of equity. I hope I will be forgiven if I do not become too involved in that debate today. The few comments I do make will indicate that, while there are some practical and short-term advantages to be gained by a theory of common law tracing, the concept seems to generate a great deal of theoretical confusion and historical distortion.

The Chase Manhattan case

Let me begin with the *Chase Manhattan* case. Briefly, the facts were that the plaintiff, the Chase Manhattan Bank of New York, was instructed to pay $2 million into the defendant's account with an international bank. By clerical oversight, this sum was paid twice. The defendant (the Israel-British Bank of London) either did not discover the error, or, if it did, it did nothing about it; and not long afterwards Israel-British presented a petition to be wound up. Chase Manhattan, not content with its right to a dividend in the winding up, sought to "trace" its money in the defendant's hands, and to have a trust imposed on any funds or assets which could still be identified as being attributable to the overpayment. Israel-British contended that this tracing right was not available in law. It was this issue alone — the availability of a tracing right — which Goulding J had to consider,[4] and in view of the international implications of the case he had to make his decision according to both English and New York law. A large amount was at stake, and it seems that counsel on both sides were in a position to research the case in considerable depth, so the arguments were extremely thorough. Not all litigation concerning money paid under mistake can support twenty-nine days of hearing and argument, including expert testimony about American law from no less a figure that Professor G E Palmer, author of the recent four-volume treatise on restitution.[5] The outcome of the argument can therefore be expected to throw considerable light on what is at best a murky and unexplored area of law.

If the decision in favour of an equitable tracing remedy is ultimately found to be justified, the implications extend far beyond the law of mistake. The claim for money paid under mistake is only one of a number of claims which modern theory now sees as "restitutionary" in character. All of

these turn on the fact that the defendant has, wrongfully or innocently, acquired money or other property belonging to the plaintiff. Sometimes the defendant has simply taken it, without authority from the plaintiff. Sometimes he has forced the defendant to give it to him. Sometimes there is a mistake on the plaintiff's part; sometimes there is an expectation that the defendant will do something which, as it turns out, he will not or cannot do.

Theorists make the point that any restitutionary claim could potentially lead to a proprietary remedy.[6] However, it is not easy to find support for that proposition in English law, and even American law does not abound with convincing examples.[7] Restitutionary actions normally entail money judgments only, and at first sight are not concerned with any kind of proprietary claim. Often they are based upon common law, not principles of technical equity, so it is difficult to take a proprietary claim very far without becoming enmeshed in the theoretical problems of "common law tracing".[8] There are, it is true, one or two cases concerning bankrupts who, through a mistake, acquire a benefit which goes directly into the bankrupt estate; their trustees have been required to return the money.[9] The theory beind these cases, however, seems to be that a bankrupt trustee, being an officer of the Court, is obliged to be more high-minded than other people. As a proposition of general theory, this is not too satisfactory. The *Chase Manhattan* case may provide a powerful impetus for a much more generally developed system of equitable proprietary claims than has previously been demonstrated.

What I propose to do in this paper is to look at the legal reasoning behind the decision, and explore generally the relationship between quasi-contractual and proprietary claims.

A broad tracing principle?

Goulding J began his legal analysis with a general proposition taken from *Storey's Equity Jurisprudence*,[10] and referred to in the leading American case of *In re Berry* (supra, n 7). Courts of equity impose a trust in invitum wherever a party has received money which he cannot conscientiously withhold from another party. This jurisdiction, according to Storey, can be traced far back into Chancery practice, predating the modern quasi-contractual action at law and, indeed, the earlier count for money had and received. Familiar instances are money paid by accident, mistake or fraud. It is true that, in later practice, Courts of common law gave effective remedies in such cases, but it is a well-established principle that Courts of equity do not lose their jurisdiction merely because it is subsequently overtaken by common law practice. In any event, there may well be cases where the common law rules are insufficient to do complete justice, and where it is indispensable to resort to a Court of equity for adequate relief. According to Goulding J (at 208, 1031), Storey's expressions of view correctly stated the principles applicable, not only in New York, but also in England.

It has been contended that this principle was limited in English law since the decision of the House of Lords in *Sinclair v Brougham* [1914] AC 398, and the intepretation put on that case by the English Court of Appeal in *In re Diplock, Diplock v Wintle* [1948] Ch 465. Goulding J regarded himself as bound by the Court of Appeal's judgment, and was therefore not able (as perhaps the New Zealand Court of Appeal is) to make an independent interpretation of *Sinclair v Brougham*. The wider view nevertheless deserves serious consideration.

In *Sinclair v Brougham* Lord Dunedin, after pointing out that technical equity would give a remedy where money is paid to a company under an ultra vires contract, as long as the money had been used to pay off a just debt, continued:[11]

> Is its action limited to that situation? I think not. I think it can always, in the exercise of the same jurisdiction, help the common law by tracing, and can say that if the proceeds of the property can be shown to be what I have called a superfluity in the person of the recipient, then it will hold that the property is traced just as surely as if it was still in the original form. To do this is to give full effect to the doctrine of ultra vires — for the party receiving is not ordered to pay as a debt the equivalent of what he originally got, but ordered merely to surrender what he still has as a superfluity, an enrichment which, but for the original reception of the money, he would have been without.

The full width of Lord Dunedin's view of the tracing remedy is seen if we turn back a few pages to the point where he begins his discussion. There at (p 431) he said:

> Now I think it is clear that all ideas of natural justice are against allowing A to keep the property of B, which has somehow got into A's possession without any intention on the part of B to make a gift to A. Where there is a contract the solution is according to the contract, or you might say the position truly does not arise. Such are the cases of a bailment of a chattel or of a loan of money. But there are many cases where the position does arise and where there is no contract.

After dealing with the case of chattels, such as misdelivered articles, Lord Dunedin turned his attention to the case of money paid under mistake, where the money would not remain in specie in the recipient's hands, but would soon change its form, either by being lodged in a bank account or being used to buy some other asset. Here, the traditional common law remedies of detinue or conversion would not work, and in their place stood the action for money had and received. Of that action, he said (at pp 431-432):

> I think one cannot help feeling that this action was truly the putting of an equitable doctrine under a legal form. I am using the word equitable in a non-technical sense, for I am not suggesting for a moment that the action was borrowed from technical equity . . . . What concerns my view, however, is only this, that it is a contrivance which is introduced to meet an equitable idea, which idea is a wider idea than that expressed by the proposition that where there is jus in re an action will lie, and where there is not such a jus it will not. This follows from the undoubted fact that where money is in question under modern conditions (by which I mean not put into bags or a stocking), there will never be a jus in re, there can at most be only a jus ad rem.

He evidently saw the common law action for money had and received as one based on a wider principle, that anyone receiving property other than by gift or contract is under an obligation to restore it to its rightful owner; and, as the subsequent course of his speech shows, he thought that this obligation could be asserted either through the traditional common law forms, or, where they failed (as in the case of property delivered under an ultra vires contract) by appeal to the broader doctrines of equity.

If this approach to equitable tracing were accepted, it would accord closely with the principles stated by Storey, and would solve many of the problems of relating common law actions to equitable remedies. There are certain principles of "natural equity" which are logically prior to both the common law action for money had and received and to equitable doctrines of tracing. They prevent any person, be he the original recipient or someone who acquires the property other than as a bona fide purchaser, from taking advantage of an unintended windfall. Although the common law raised the fiction of a contract and thereby reached the position that the recipient was liable to repay the money as if it were a debt, the underlying principle went further than that and gave the claimant a "jus ad rem", a right to have that particular item restored. This principle cannot be given full effect through the common law action in cases where there can be no imputation of a contract or, I venture to suggest, where the "debt" would be merely provable in bankruptcy, leaving the bankrupt trustee in possession of funds which were subject to this "natural equity". At this point, equity can step in and declare that the money, or rather the fund in its changed form, is held on trust for the claimant, freed of the claims of the bankrupt's trustee.

The narrower view prevails

Regrettably, it must be conceded that this broad view of tracing has not been accepted as the law in subsequent cases. Particularly since the judgment of the Court of Appeal in *Re Diplock* [1948] Ch 465 the view has been taken that equity will not intervene in the case of any unjustified enrichment on the recipient's part; there must first be a "fiduciary relationship" between the claimant and the original recipient. This view is largely based on the speech of Lord Parker in *Sinclair v Brougham*, where he said at 441-442:

> Equity, however, treated the matter from a different standpoint. It considered that the relationship between the directors or agents [of the company whose contract was ultra vires] and the lender was a fiduciary relationship, and that the money in their hands was for all practical purposes trust money. Starting from a personal equity, based on the consideration that it would be unconscionable for anyone who could not plead purchase for value without notice to retain an advantage derived from the misapplication of trust money, it ended, as so often was the case, in creating what were in effect rights of property, though not recognised as such by the common law.

The effect is to narrow the scope of the tracing doctrine. While it is possible to take a fairly broad view of who is a fiduciary[12] (if anyone had told the depositors in *Sinclair v Brougham* that when they paid their money over the counter at the Birkbeck Building Society they were really entrusting the money to the directors of the Society personally, they would have been quite astonished), some categories of restitutionary claim must evidently be excluded. The most obvious is that of the thief who, unbeknown to me, steals my wallet and pays the money into his own bank account; unless the concept of "fiduciary" is extended to the point where it is virtually meaningless as a restriction on equitable tracing, I cannot follow the money into the bank account. My traditional common law remedy is not of much use, since it will give me no more than a money judgment enforceable (but for the thief's bankruptcy) as a debt. There is some authority for the proposition that I can still trace, not in equity, but in common law,[13] but it seems to me that one can get into difficulties trying to support that view theoretically.[14] Once the money gets to the bank, it is received by the bank for value and converted as far as the bank is concerned into a debt owed by the bank to the thief. It is hard to see how, according to common law principle, I can maintain anything other than an action for money had and received against the thief since any legal property rights I may have had are gone.[15] The result may well be that without equitable tracing the bankrupt trustee of a thief (and his unsecured creditors) benefit from a windfall that could not have been sustained if the money had been obtained from me by fraud.

Goulding J, in the event, found himself bound by the interpretation of *Sinclair v Brougham* given in *Diplock's* case, and was forced to reject Lord Dunedin's approach to equitable tracing. He accepted instead (at 209, 1032) the Court of Appeal's view that "an initial fiduciary relationship is a necessary foundation of the equitable right of tracing". The right to trace, and the right to sue someone who has acquired an unjustified enrichment, are evidently not co-extensive. A qualification which we in New Zealand might put upon this is that our Court of Appeal, not being bound by *In re Diplock*, might possibly be persuaded to re-examine *Sinclair v Brougham* and put a wider interpretation on it (see supra, n 11).

Tracing in cases of money paid under mistake

Accepting that the right to trace is limited in scope, Goulding J, then had to consider whether a payment of money under mistake can give rise to equitable tracing. At first sight there are some difficulties in the way of that proposition. The relationship between a payor and a payee is prima facie one of debtor and creditor; the payor ostensibly owes the payee money, and in paying does not entrust the payee with anything at all, nor does he look to the payee for the performance of fiduciary obligations. How can he be in a fiduciary relationship merely because both are mistaken about the existence or extent of the payor's liability?

A close consideration of the result in *Sinclair v Brougham* convinced the learned Judge that such an objection takes too narrow a view of "fiduciary relationships". In that case itself there was ostensibly a relationship of debtor and creditor, when the depositors paid money to the Birkbeck Building Society under the impression that the society would act as their banker and thus become, in law, their debtor.[16] Nevertheless, since the society could not lawfully take the money, some kind of relationship arose between the depositors and those responsible for managing the society. It was, at least in the view of Lord Parker, fiduciary in character ([1914] AC at 441). The same principle, in Goulding J's view, could equally apply to cases of money paid under mistake. He said, at 209, 1032 (citations omitted):

> . . . the fund to be traced need not . . . have been the subject of fiduciary obligations before it got into the wrong hands. It is enough that, as in *Sinclair v Brougham*, the payment into wrong hands itself gave rise to a fiduciary relationship. The same point also throws considerable doubt on [counsel for Israel-British's] submission that the necessary fiduciary relationship must originate in a consensual transaction. It was not the intention of the depositors or of the directors in *Sinclair v Brougham* to create any relationship at all between the depositors and the directors as principals.

> Their object, which unfortunately disregarded the statutory limitations of the building society's powers, was to establish contractual relationships between the depositors and the society. In the circumstances, however, the depositors retained an equitable property in the funds they parted with, and fiduciary relationships arose between them and the directors. In the same way, I would suppose, a person who pays money to another under a factual mistake retains an equitable property in it and the conscience of that other is subjected to a fiduciary duty to respect his proprietary right.

He also found support for that view in the speech of Viscount Haldane in *Sinclair v Brougham*, taking comfort from the fact that that learned lord "unlike Lord Dunedin, was not suspected of heresy" by the Court of Appeal in *In re Diplock*. Viscount Haldane had expressly included money paid under mistake as one of those cases where there could be tracing at law,[17] and went on to say (at 420-421) that there could also be equitable tracing in such cases, within the Court of Chancery's auxiliary jurisdiction. In other words, once a Court of equity finds that common law Courts allow an (albeit imperfect) tracing remedy, it should permit a plaintiff to avail himself of the more extensive tracing remedies available in equity as well.

Orthodoxy or heresy?

As Goulding J appreciated, this broad version of what might constitute a "fiduciary relationship" came very close to Lord Dunedin's statement of principle, which had been criticised as heresy by the Court of Appeal. However, on looking carefully at the vital passage in the Court of Appeal's judgment ([1948] Ch at 541-543) he concluded that what had been rejected was the "suggestion that the tracing remedy could be applied wherever the defendant could be shown to have got an unjust enrichment, a superfluity as Lord Dunedin called it." The Court of Appeal was insisting upon a "more precise test", that is, "a continuing right of property recognised in equity or of what I think to be its concomitant, 'a fiduciary or quasi-fiduciary relationship' " (at 210, 1033). The Court of Appeal had recognised (at 540) that the relationship which gave rise to tracing had not been finally laid down. On the assumption that there was nothing in the Court of Appeal judgment which was opposed to a tracing remedy in the present case, Goulding J believed himself free to apply the general principles he had earlier culled from the American authorities.[18]

If this is correct, the Gordian knot of theory which binds equitable tracing has been well and truly severed. The crucial determinant lies not in the relationship of payor and payee, but in the equitable obligation of the payee to restore money to its rightful owner. This obligation arises most obviously where the payee has been specifically entrusted with the payor's money (a fidicary relationship in the strict sense), but it can arise in many other situations too — a mistake, duress or even possibly theft of money, where the thief can convert the money into other property he will legally own. The very width of this proposition (which in effect, if not intent, cannot be too far from that of Lord Dunedin) may create doubt in some minds about its validity, especially since both Courts and theorists have hitherto been extremely guarded. Can it be supported, and, if so, how extensive will the tracing remedy be?

The tracing remedy is found most commonly where claims are made against a fiduciary agent or his assignee in bankruptcy, for moneys or property he has received on the principal's account. By exploring that example we can gain insights into the theory and historical background of the present law. Beginning there, I shall go on to discuss claims based on mistake, duress and fraud, and then claims founded on the assertion that the plaintiff's property has got into the defendant's hands and he has converted it to his own use. Finally, I shall look at claims arising out of frustrated or invalid contracts. In each of these cases there is a recognised quasi-contractual remedy, giving rise to a money judgment and a right to prove in the defendant's estate if he is bankrupt. They are also "restitutionary" in character, that is to say their moral justification, and possibly their legal foundation, lies in the defendant's unjust enrichment. Ought they to give rise to a proprietary remedy as well?

Fiduciary agents — a developing doctrine

Where a fiduciary agent, such as a stockbroker[19] or a motor vehicle dealer,[20] receives property on behalf of a principal, there can be few theoretical doubts about the principal's right to trace. Sometimes money is paid directly by the principal to the agent, with a view to the agent buying something for the principal,[21]. Sometimes the agent is entrusted with an asset belonging to the principal, with power to dispose of it to a bona fide purchaser; if a sale takes place, the principal will wish to "trace" his assets into the proceeds of sale.[22] In view of the fiduciary relationship, there can clearly be equitable tracing. Refined arguments based upon "common law tracing", if such there can be, are unlikely to be relevant, or indeed to be encouraged by any Court anxious to strip away the technicalities based on the old duality of equity and common law.[23] The general right to trace is established by common law and equity precedents going far back into the eighteenth century.

The principal practical difficulty is (and always has been) identifying what property "belongs" to the principal. Sometimes it is clear that the parties have no intention that any property should be specifically set aside for the principal. Thus, if I pay money into my bank, it has no obligation to "look after" my particular money; when I call for repayment, any money will do. The result is that in law the bank is my debtor but not my fiduciary agent (supra, n 16). Even if this were not the accepted implication, there would be considerable difficulty in finding any particular asset which my money (of the many thousands of transactions taking place in one day) had gone to.[24]

In the early days of the tracing doctrine, it was generally assumed that the same principle applied wherever a fiduciary agent mixed the principal's funds with others in his general account.[25] This meant that the principal's tracing rights were of limited practical value; he could succeed only where the funds had not been paid into a general account (as in *Scott v Surman*, supra, n 22) or, having been paid in, were then applied by the agent in some manner clearly referable to the principal's mandate.[26] In other cases, unless the mixed fund was clearly set aside as a trust fund for his clients, it seems that the trustee in bankruptcy could take the money and the clients could only prove in the bankruptcy. However, Courts of equity have in more recent times developed techniques which are quite adequate to keep such funds out of the hands of the Official Assignee; I refer in particular to *In re Hallett's Estate, Knatchbull v Hallett*, (1880) 13 Ch D 696, 711, where the Court used the device of placing an "equitable charge" on a fund in which there were combined the money of the

principal (in that case, a beneficiary under a trust) and the moneys of the agent or trustee. The same technique could be applied where the other moneys are those of an innocent third party.[27] As long as the principal believes that the agent is holding his money, or the proceeds of sale, on the principal's own behalf (a common impression, I suspect, among laymen) and as long as the "mixed fund" has not been dissipated, then it seems to me that the way is open for tracing.

The Romalpa case

These principles have been put to the test in a novel way in the last few years, as a result of the security device used in the *Romalpa* case.[28] The "tracing" the Courts have been concerned with there is not of money, but of goods and the proceeds of their sale. Let us suppose, for example, that I sell timber to a manufacturer, and I know that I am not going to be paid for the timber until the manufacturer has built a boat and sold it to a client. How am I going to be sure of getting paid? I could insist on being given a security over the boat when it was built, but there are all kinds of hazards with such a device: I have to make sure that the agreement to charge is registered: I run into trouble with priorities if the manufacturer is a company which has given a "floating charge" over its assets to a financier:[29] if the manufacturer is an individual debtor and the boat to be completed before taking my charge, I may be caught by s 57 of the Insolvency Act 1967 dealing with securities given for past indebtedness. It would be much simpler just to retain ownership of the timber, maintaining that, as between the builder and myself, he is my fiduciary charged with looking after my property until he can acquire title by paying for it. True, as a buyer in possession he can dispose of the goods to a third party and destroy my title,[30] but in the meantime I have enough to keep out the Official Assignee[31] and if I am lucky (and word my agreement correctly) my equitable "charge" on the boat may be converted into an equitable charge on the proceeds of sale and thus be equally immune from the Assignee's grasp.

This device is being used increasingly both in England and New Zealand; as far as reported cases go, the score seems at present to be 2-1 to the Assignee. The *Romalpa* case itself, where the device was successful in keeping out a liquidator, was a comparatively simple case of goods acquired from the supplier and then re-sold; an express reservation of equitable ownership in the goods gave the supplier an equitable right to the proceeds of the sale. The Court did not there have to deal with manufacturing processes using the supplier's product. However, it referred explicitly to *Hallett's* case as stating the principles applicable; as I have said, *Hallett's* case deals with mixed funds, and I see no reason why it should not apply equally to mixed goods.[32] In the other two cases, where manufacturing processes were involved (in one instance, fibre into carpets,[33] in another, resin used in the process of making chipboard),[34] the outcome was much less encouraging for those who wished to use the device. The Court in both cases held that the transaction in question amounted to a "charge" on the company's assets and it ought to have been registered. In this general overview of the tracing remedy, I forbear from any detailed comment on these cases, important and topical as they are. I believe each case must turn on its own facts, and the wording and intentions of the security agreement in question. I can see quite strong policy reasons, in both these cases, why Courts should have declined to allow a tracing remedy. Where you have a large and expensive manufacturing process, it can be artificial and unjust to concentrate on questions of physical identity (for instance, the fact that in *Re Bond Worth* a large proportion of the finished product represented the seller's fibre), to the exclusion of the purchaser's contribution to the finished product through his machinery, labour and organisation. This was the situation in both of these two cases; I do not read them as saying that there can never be tracing once property has passed through a manufacturing process. Such a reading would seem to me inconsistent with the principles in *Hallett's* case.

Taylor v Plumer

Another significant problem arises where the fiduciary agent goes beyond his authority, perhaps even deliberately misappropriating property to his own ends. Can the principal's proprietary rights survive this unexpected event? There are several cases which establish that, as long as the product of the misappropriated funds can be indentified, there can still be tracing. The leading case is the early decision in *Taylor v Plumer*[35] where a broker misappropriated funds given him to buy securities; instead, he bought bullion for himself and departed from America. The principal pursued him, had him arrested and re-took the bullion. The agent's trustees in bankruptcy objected to the principal's actions, and contended that since the re-taking occurred after bankruptcy the bullion belonged to them. The Court of King's Bench, however, rejected this contention; notwithstanding the agent's breach of duty, the bullion was subject to a trust in favour of the principal, and was not available in the bankruptcy. The principle is that an agent cannot put himself or his creditors in a better position, by performing a dishonest act, than he would have been in had he carried out his fiduciary obligations.[36] This principle has been accepted in New Zealand.[37]

Before leaving the fiduciary agent, I would like to make some comments on the theory of tracing in this context, and the history which lies behind it. For reasons I have already given, this is of little immediate relevance in cases of fiduciary agents, since the tracing right is well established. We can find in these cases, however, valuable insights which will assist us in considering how the same principle should be applied in other contexts.

Why allow tracing?

What justification is there for giving the principal a proprietary remedy which will take the traced asset out of the fiduciary agent's insolvent estate? It is plain that tracing does not depend upon common law notions of "property", since in most of these cases the agent will have actual or ostensible authority to dispose of the principal's property. On such disposal, the principal has therefore lost whatever legal property rights he once had; to use Lord Dunedin's language, there is no "jus in re". Perhaps, if the agent consciously acquires new property to set aside for his principal, he has conferred legal title on his principal rather than himself; but in most cases this will involve a fairly strained reading of the facts. It is clearly inapplicable, moreover, in cases such as *Taylor v Plumer*, where the agent deliberately acquires the product for himself. Again using Lord Dunedin's language, the most convenient way of describing what has happened is to say that the principal has a "jus ad rem"; a right, as between himself and the agent (and, if the agent is bankrupt, his assignee) to treat the property as his own, even though he may have no general right of property valid as against

the whole world. This "jus ad rem" is the basis on which the principal can contend that the agent and his creditors will be unjustly enriched if the property is taken as part of the agent's assets. But for the trust placed in the agent, the agent would have nothing; he and his creditors will therefore be no worse off if by removing the asset the Court ensures they are in the position they would have been in if the transaction had not been entered into. The only claim they could legitimately make (and here the test of "identifiability" comes in) would be if the principal's property has become so inextricably interwoven with the agent's that its subsequent removal will result in depriving the creditors of assets or advantages which rightfully belong to them.

On what basis can this characteristically equitable notion of property be enforced in Courts of law? What is the theoretical foundation for the equitable remedy?

The usual starting point for this type of debate is the case of *Taylor v Plumer*, (supra, n 35) which I have just mentioned. It is often urged that *Taylor v Plumer*, having been decided in a Court of common law prior to the fusion, is authority for the proposition that there may be "tracing" at common law.[38] Close attention to the terms on which it was decided, and the earlier case law, leave me in considerable doubt. These earlier cases all recognised that the fiduciary owed trust obligations in respect of property so acquired, and grappled with the problem of how, if at all, these acknowledged equitable obligations could be enforced in a Court of law.[39] In the end, it was found[40] that the most satisfactory device was simply to say, in cases of agents who become bankrupt, that the statute empowering a bankrupt's trustees to take his property had no application to property he holds upon trust.[41] Now, while Courts of common law do not usually of their own motion apply doctrines of equity, they have a general duty to apply statutes in the way in which they are intended, and can take cognisance of equitable circumstances which would take the particular facts out of the statute.

That is one possible explanation of *Taylor v Plumer*; I draw particular attention to the words of Lord Ellenborough CJ, who said, at 575-576, 726:

> That trust property in the possession of a factor empowered to dispose of it for his principal does not pass to his assignees under the Stat Jac 1, upon his becoming a bankrupt, was established in the case of *L'Apostre v Le Plaistrier*[42] . . . ."

He went on to refer to *Whitecomb v Jacob* (supra, n 25), where the same doctrine was applied to the case where a factor had acquired other property with the proceeds of the merchandise he had disposed of. The theme is picked up again later in the judgment (at 579, 727), where he says:

> He has repossessed himself of that, of which, according to the principles established in the cases I have cited, he never ceased to be the lawful proprietor; and having done so we are of opinion, that the assignees cannot in this action recover that which, if an action were brought against them the assignees by the defendant, they could not have effectually retained against him, in as much as it was trust property of the defendant, which, as such, did not pass to them under the commission.

There seem to me to be two possible explanations of this passage. One is that lawful ownership of the bullion was acquired by the agent, upon trust for the principal; but that, as between bankrupt/assignees (who had no title at all) and the principal (who had the immediate right to possession of the money), the principal had the better title (a "lawful" title in a non-technical sense) and the assignees could not implead this by invoking the jus tertii, in the shape of the legal title vested in the bankrupt agent. The other explanation is that legal title remained with the principal throughout the various transformations of his original property, which had been given to the agent upon a "trust" (in the non-technical sense) that he would carry out his instructions.

An alternative view

Theorists will argue on the point; I would offer here not a new answer but a somewhat different perspective. If the common law did lend its aid to the tracing claimant, through extended notions of either possessory rights or rights of legal title, it did so belatedly, and in an attempt to emulate what had been achieved with much less difficulty in the Courts of Chancery. This much at least is reasonably plain as one looks back at the development of the doctrine in the eighteenth century. If the Chancery Courts took the lead in these matters, upon what was their jurisdiction based? Viscount Haldane said that the common law gave a general tracing remedy but was powerless where the money was paid into a bank account, whereas equity had merely a concurrent jurisdiction together with the power to give its own superior remedies in the latter case.[43] But this seems, with respect, unconvincing. It is more likely that Courts of equity picked up something much more general — an underlying principle which the common law, because of its limited range of remedies, could not at first give effect to, and when it did recognise it, could apply only indirectly and with difficulty.

I believe that quite a cogent historical argument might be constructed along those lines. The claim against the fiduciary agent, under earlier law still, had been dealt with in the action for account. This was a very cumbersome action, from a common law point of view; the claimant had first to establish his right to account, and only when this was admitted or proved could he move to the actual working out of the state of accounts.[44] The form was significant, though; it implied that, both at and after the time the action was brought, the plaintiff had a continuing right to some asset in the defendant's hands, at the very least a jus ad rem, in Lord Dunedin's terminology. The practical inconvenience of the double procedure, and the difficulties experienced with the methods of trial under the old writs, led litigants to seek better forms of action; they moved first to debt,[45] and then to the fledgling action on indebitatus assumpsit,[46] where they eventually developed the count for "money had and received to the plaintiff's use". As Langdell observed,[47] by resorting to the latter action they changed the nature of their claim. They no longer sought a remedy based on their continuing rights of ownership; they sought a money judgment based upon the fiction that the defendant had become indebted to them by reason of a promise to pay. The proprietary right was no more than the foundation for the "ties of natural justice" on which the action in indebitatus assumpsit depended;[48] the action itself emphasised the defendant's liability to pay an unspecific, unidentified sum of money.[49]

This achieved, in very simple cases where the fiduciary agent remained solvent, an expeditious means of recovering money the fiduciary had failed to pay back; but it would have been

readily apparent to lawyers at that time that, if the accounting was going to be at all complex, or if a money judgment would not be effective, it was wise to seek an accounting in equity.[50] Equity's role in this matter went much further than merely latching on to an established common law right to trace. It "followed the law" in the sense that the principles it followed were already implicit in the practice under the old common law action of account; the obsolescence of that action left Chancery with an important role to play, as the only forum in which the "jus ad rem" could be directly pursued. There are a number of early examples where this function is apparent;[51] and, as I have said, it was acknowledged by common law Courts at this time that Chancery's powers outran their own (supra, n 39).

If this argument can be sustained, it has some significance for the other types of claim which have hitherto taken a quasi-contractual form. From a theoretical point of view, we would be able to point to the true reason why such claims have given rise only to money judgments. It is not that any other remedy is inconsistent with fundamental principle; it is that the choice of a common law remedy necessarily gave incomplete expression to the principles of "natural equity" on which such claims are based. From an historical point of view, if we are obliged to look back into the antecedents of present day rights and obligations to find out whether they will support a tracing remedy (a precaution which Lord Dunedin evidently omitted or thought unnecessary), it will be of considerable significance if we find that they were once enforceable through the common law action of account.

Fraud, mistake and duress

It is of course, well established that money paid under mistake (whether fraudulently or innocently induced by the payee, or not even induced at all),[52] and money paid involuntarily in reponse to actual or implicit threats,[53] can be recovered as money had and received by the payee to the plaintiff's use. The outcome of this quasi-contractual action is, as I have already pointed out, a money judgment, which may be of limited value if the payee is insolvent. Can a plaintiff also point, as a matter of general principle, to an equitable right of property in any asset in the defendant's hands which is attributable to the original mistaken or coerced payment?

If such a principle existed, it would be of special importance in the light of recent developments in the law of contract in New Zealand. Under the former law, a contract entered into under mistake, or induced by fraudulent or innocent misrepresentation, might be set aside in equity[54] (if it was not already void at law[55]). That remedy would be available not only against the other party to the contract but also against his assignee in bankruptcy.[56] The effect would be a rudimentary form of "tracing". Assuming that the remedy had not been lost as a result of laches, or events subsequent to the transactions which made it "practically unjust" to grant relief,[57] the plaintiff would get his property back irrespective of the bankruptcy, unless it had become unidentifiable. The same is true under the law of duress, which seems to be undergoing a renascence at the present time.[58] But in New Zealand, the Contractual Mistakes Act 1977 and the Contractual Remedies Act 1979 put a somewhat different complexion on this matter, since the Courts are given wider powers and must presumably make a conscious choice whether they should exercise those powers in a way which will deprive the Assignee of what appears to be his property. Under the Contractual Mistakes Act the Court may validate void transactions, and may grant compensation (rather than rescission) in cases where the contract might otherwise have been voidable (s 7). Under the Contractual Remedies Act contracts which would previously have been voidable for misrepresentation are now prima facie valid, subject to an award of damages, unless an order for revesting of property is made by the Court (ss 8(3), 9(2)).There is nothing in the two Acts which prevents the Courts from ensuring that the victim of fraud or mistake is adequately protected in the event of supervening bankruptcy; but unless it can be shown that there are broad principles of equity which require them to afford such protection, they may be reluctant to do so.

Looking at the matter as one of first impression (as Goulding J had to do), there is a lot to be said for the view that money paid under mistake or duress is traceable. Equity's general power to intervene in cases of fraud, accident and mistake is axiomatic, and its practice of allowing relief to mistaken, defrauded or coerced contracting parties well established. While in recent years Courts of equity have tended, in cases of money paid under mistake, to adopt the principles laid down by the law in order to ascertain whether relief should be given,[59] the jurisdiction would not be lost simply because of the later expansion of the common law.[60] As for the common law remedies, it seems that the actions for money paid under mistake or duress are descended from the old action of account,[61] and thus (if my preceding suggestions are accepted) quite probably founded upon a "jus ad rem" and not merely a common law right to repayment. A tracing remedy could thus be said to have descended through an impeccable lineage. Considerations of justice, too, point in very compelling fashion to the need for a tracing remedy. A slip is made, and money passes into the wrong hands; the recipient would normally have paid the money back as soon as he discovered the mistake; but it so happens that, on the very day, he becomes bankrupt and is no longer master of his own financial affairs. The tracing remedy is strongly indicated as a practical way of meeting the problem, and the legal path is relatively free from technical difficulties.

Without wishing to detract from the force of that argument, I would add a few words of caution. While some illustrations can be given which point strongly to the need for a tracing remedy, there may be others which point equally strongly in the opposite direction. Let us suppose, for example, that the managers of the declining Bubble Company devote their last few months in office to filching large sums from the public on various spurious pretexts of one kind or another; and let us suppose that, on liquidation, any surplus assets it possesses are attributable to these activities. In practice, the great majority of these false transactions will have produced assets which are untraceable; only the defrauded claimants who paid in their money shortly before liquidation will have any hope of employing the tracing remedy. Why should they be treated so differently from all the other defrauded claimants, when their only distinguishing mark is the date of the transaction? Perhaps that is a case for recognising the "jus ad rem", but not giving relief in such a way that other creditors (including defrauded claimants) take a deferred priority in the assets in question.[62] I do not think that such examples cast doubt on the need for a tracing remedy; but they do show that considerable discrimination is required in its application.

Stolen or converted property

If a thief takes my property he acquires no legal ownership of it, and as long as it remains in his hands it is legally mine. Even if he sells it to a third person who acts innocently, it usually remains my property and I can sue that person as well as the thief; though the position is different in relation to bank-notes, which pass in currency when negotiated by a thief.[63] My standard legal remedies will be in detinue or conversion. These are basically tort remedies and need not detain us. There is, however, a lesser-known quasi-contractual remedy known as "waiver of tort".[64] If the thief manages to dispose of the property profitably, I may prefer to sue him in quasi-contract to get the benefit of his favourable bargain; he will be liable to pay to me the amount he has received. Can I also trace these proceeds in his hands, so as to prevail against his assignee in the event of bankruptcy?

There seems to be more difficulty with this kind of case. Historically, there is not the same lineage; from what historians tell us, the action was not available against a thief, since it was a prerequisite of the action that the defendant had assumed a fiduciary duty to the plaintiff.[65] And if the matter was put no higher than the contention that the defendant had "profited from his own wrongful act", then there is some authority[66] which says that Courts of equity will not attribute proprietorship of that profit to the plaintiff, even where the profit arose from breach of a fiduciary duty. Moreover, if the thing which is stolen still remains mine as it passed into the hands of an innocent tranferee, I have my proprietary remedy against him. Unless the property has totally disappeared my right to trace into the proceeds of sale is an auxiliary one, and not essential to maintain my rights of property. It is thus by no means self-evident that I should retain both my right of ownership in the stolen chattel and proprietary rights in its product, even if I were forced at an early stage to elect which of these rights I was going to pursue.

Nevertheless, there may well be cases where failure to allow a tracing remedy results in clear injustice. For instance, suppose a thief takes my money and buys a motor car with it; I have lost my money; why should I not take the car, and how can the Assignee of the thief maintain that the funds available to creditors should be swelled by the proceeds of a plainly wrongful act? Or, to take another example, suppose the thief takes my cheque, pays it into his bank account, and then uses the money to make lavish gifts to his mistress; why should she keep the proceeds of crime, even if she is unaware of the source of the money?[67] If one looks at the matter without the benefit of an historical analysis, it certainly seems very strange that I can trace where a fiduciary has misapplied my money, but I cannot do so when a thief has taken my property and that property is lost, leaving the thief, his assignee or his friends in possession of funds which are clearly derived from his wrongful act.

I would therefore be suprised if, in cases of that kind, some means were not found to give the claimant a proprietary remedy. Perhaps the means lie, as a number of theorists have suggested, in "common law tracing", despite the doctrinal difficulties with that concept. Perhaps, as Goulding J seems to indicate, the answer lies in a much deeper understanding of the role of equity in these situations; though to carry this thinking through, it may be necessary to discard some of the statements of law found in *Re Diplock*, a course not open to an English Judge of first instance. This is a point for Courts to settle in the future; its solution was not essential to the result in the *Chase Manhattan* case.

Disappointed contractual expectations

Another area of law which I can only touch on in this paper is that of the broken or frustrated contract. I am afraid our legal training has conditioned us to think of contractual claims in a rather stereotyped way; our thoughts turn naturally to actions for debt, and for money damages for breach of contract. However, in the midst of contract we are in restitution. Quite apart from statute,[68] the common law allowed a characteristically restitutionary remedy based upon "total failure of consideration", where a contract had broken down and the plaintiff derived no benefit for money he had paid the defendant.[69] This applied not only in cases of breach but also where the contract was frustrated.[70] Again, where the parties are acting under what they think is,[71] or will become,[72] a binding contract, one may sue the other in quasi-contract for benefits conferred in the expectation of contractual reward. Nor are the remedies for disappointed expectations solely legal; they may be equitable, and they may involve the imposition of some form of trust or equitable proprietorship affecting the defendant's property. Such remedies may well confer priority over the Assignee and general creditors.

To take a few illustrations, in the case of breach of contract, the action for specific performance is one which can be pursued against the Assignee; we are all familiar with the idea that a purchaser under a specifically enforceable contract becomes "equitable owner" of the property affected. Perhaps we are too familiar with it ever to have speculated on its effect of conferring priority on the purchaser if the seller becomes bankrupt. What is so special about this type of contract, that we do not leave the purchaser to prove in the bankrupt estate for damages for breach of contract? In modern times, other examples of equitable remedies have begun to take their place alongside the orthodox doctrine of specific performance. Thus, we are told that if the contract is vitiated by some formal defect, Courts of equity will not allow the defendant to shelter behind the statute in question and thereby defeat expectations he has engendered; a constructive trust may be imposed to protect those expectations.[73] Even if there is no real contract, but a rather cloudy assumption that by putting money into property the plaintiff will in some way ensure continued occupation, this expectation may give rise to a "constructive" or "resulting" trust in the plaintiff's favour;[74] and it now appears that this trust can prevail over the defendant's trustee in bankruptcy.[75] All of these remedies subtract from the bankrupt estate property which belongs legally to the bankrupt, and preserve it for one specially favoured claimant.

Nevertheless, if there is one idea which is central to the whole theory of tracing, it is that an ordinary unsecured creditor can never become a tracing claimant.[76] If his contract does not work out the way he expects, he is referred on to his purely contractual remedies, unless he can in some way get rid of the contract. This notion, while it may not necessarily be the decisive factor against relief in claims arising out of contractual situations, will certainly be influential in limiting the scope of tracing relief.

Moreover, as in the case of waiver of tort, it is not possible to point to historical grounds for the tracing remedy. Where a contract is broken and the innocent party treats himself as being discharged by the other's breach, the general theory is that the contract has created valid rights up to that point, and is only discharged in so far as future

obligations are concerned.[77] Thus, the inference is that property which was transferred to the party in breach before the discharge remains his notwithstanding termination. The quasi-contractual remedy for money paid, where there has been a "total failure of consideration", has different origin from the one of the law of mistake and duress, and apparently cannot be traced back to the old common law action of account.[78] The technical difficulties in the way of a tracing remedy are therefore not to be under-estimated.

Conclusion

In this paper, I have tried to show that the *Chase Manhattan* case opens the way to a tracing remedy which is fairly extensive in its scope, though there are areas of restitution from which it may be excluded either by historical accident or by conscious policy. The fact that there is potentially a proprietary remedy, however, does not imply that the Courts are going to strain factual findings, or make generous presumptions, in order to allow tracing in a case where the defendant does not still retain an asset which is clearly identifiable as attributable to the original asset given him by the plaintiff. Goulding J does not go into these matters, and a discussion of the established law of tracing would add to the length of this paper beyond what reason permits. I would say, however, that the detailed "rules" or "presumptions" about tracing property were developed by a few cases in the late nineteenth and earlier part of the twentieth century. Nearly all of them were about property which had been misapplied by a trustee. Of these, only a handful dealt with the specific problem of the conflict between the tracing claimant and the trustee's general creditors. I think it would be open to the Court to exercise discrimination in applying those presumptions to the extended range of cases I have been talking about today. They could be seen as rules of "practice" concerning the identification of trust property; they do not necessarily apply to property which is not specifically given to the defendant pursuant to an express trust.

With that qualification, I believe that the law as it has now been stated in *Chase Manhattan* is to be welcomed. It is not a novel development without basis in established principle; on the contrary, the principles of "natural equity" on which it is based can be traced back a long way into our legal history, even if centuries have passed without their being given adequate expression. Considerations of justice, moreover, clearly require that the Courts look beyond the mere fact that a bankrupt is the legal owner of property, where it is alleged that he (and hence his general creditors) have been unjustly enriched as a result of some transaction which has taken place prior to bankruptcy. By linking these considerations to the general theory of "tracing" and proprietary remedies, the Courts will make significant progress towards clearing up the confusion and uncertainty which attend this subject in modern law.

The short comments that follow are lifted from the Triennial Conference Committee's "Conference Brief":

Mr Dugdale described Professor Sutton as a "latent restitutionalist" in that the possible areas of application mentioned in the paper could really be explained with reference to the principles of restitution in contract. This view was supported by *Mr Justice Mahon*.

Dr W J Gough of Canterbury thought the remedy was illusory and that a creditor ought to prefer a floating charge over assets to secure ultimate payment as was successfully achieved in the *Romalpa* case (1976).

"Of course, I paid it by mistake. I didn't know it was going into liquidation" wouldn't, in the lighthearted view of *Mr S J Tilley*, a Dunedin chartered accountant, be sufficient to invoke the tracing remedy. Every commercial transaction contained an element of business risk and a careless payment by a creditor would not necessarily attract the sympathy of the liquidator to invoke the equitable tracing remedy.

In reply, Professor Sutton reiterated the fact that the *Chase Manhattan* case had provided an equitable remedy with extensive application, and that it was important to look at broad principles at this stage to see how the law would develop and be refined in the future.

1. [1980] 2 WLR 202, [1979] 3 All ER 1025.
2. See *Thomas v Houston Corbett & Co* [1969] NZLR 151 (CA); *R E Jones Ltd v Waring & Gillow Ltd*, [1926] AC 696. In New Zealand, the right of recovery is subject to a "change of circumstance" defence: Judicature Act 1908, s 94B, as inserted by Judicature Amendment Act 1958.
3. See *Kelly v Solari* (1841) 9 M & W 54, 152 ER 24.
4. See at 206, 1029; 218, 1040.
5. Palmer, *Law of Restitution* (1978).
6. Goff and Jones, *Law of Restitution* (2nd ed 1978), ch 2; 1 Palmer, supra note 5, 175 et seq; 5 Scott, *Law of Trusts* (3rd ed 1967), 3417-3418, 3427 et seq, 3571. See also Stoljar, *Law of Quasi-Contract* (1964), ch 1.
7. Apart from cases of breach of fiduciary duty, fraud and conversion: 1 Palmer, supra 177-178. The leading case of proprietary remedies for mistake is still, apparently, *In re Berry* 147 F 208 (2d Cir 1906).
8. See eg Goode, (1976) 92 LQR 360, 361, 367-401, discussed Khurshid and Matthews, (1979) 95 LQR 78; Scott, (1966) 7 UWALR 463, discussed Cuthbertson, (1968) 8 UWALR 402.
9. Eg *In re Thellusson, ex p Abdy* [1919] 2 KB 735; *In re Clark, Ex p Trustee v Texaco Ltd* [1975] 1 WLR 559, [1975] 1 All ER 453 (both cases where the benefit was conferred after the recipient had become bankrupt).
10. 2 *Commentaries on Equity Jurisprudence* (2d ed 1839), paras 1255-1256.
11. [1914] AC at 436-437; applied *Tauranga Borough v Tauranga EPB* [1944] NZLR 155, 229 (CA).
12. Cf *Re Coomber, Coomber v Coomber* [1911] 1 Ch 726, 728-729, per Fletcher Moulton LJ.
13. Principally *Banque Belge pour l'Etranger v Hambrouck* [1921] 1 KB 321, discussed Goff and Jones, supra n 6, at 51-53.
14. For an example see Goode's discussion of the *Hambrouck* case, supra n 8 at 378-381.
15. This is the received view, if one accepts the "fiduciary duty" limitations; see Goff & Jones, supra n 6, at 55. Yet even appying equitable tracing, Goode thinks that the limitation can be got around and the proceeds traced into the hands of the thief; supra n 8, at 532, n 21.
16. Cf *Paget's Law of Banking*, (8th ed 1972) 84-86; *Foley v Hill* (1848) 2 HLD 28, 9 ER 1002.
17. [1914] AC at 420, following *Taylor v Plumer*, infra nn 56, 61.
18. The judgment goes on to explore the conflicts of laws aspects of the case, which are fascinating in themselves but cannot be discussed here.
19. See *Ex p Cooke, In re Strachan* (1876) 4 Ch D 123, 128-129; *Bowstead on Agency* (14th ed 1976), 343-347; and cp Langdell, (1889) 2 Harv LR 251, 261-262.

20. Eg *Dexter Motors Ltd v Mitcalfe* [1938] NZLR 804 (CA).
21. *Taylor v Plumer* (1815) 3 M & S 562, 105 ER 721.
22. *Scott v Surman* (1742) Willes 400, 125 ER 1235.
23. See *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904, 924, 944, 957.
24. Cf *Re Securitibank* [1978] 1 NZLR 97, 182.
25. *Whitecomb v Jacob* (1710) 1 Salk 160, 91 ER 149; *Scott v Surman*, supra n 22, at 402-404, 1237; *Taylor v Plumer*, supra n 21, at 575, 726.
26. Eg *Ex p Sayers* (1800) 5 Ves 169, 31 ER 828.
27. See *Sinclair v Brougham*, supra, at 442 per Lord Parker.
28. *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 1 WLR 676, [1976] 2 All ER 552.
29. See eg *Re Manurewa Transport Ltd* [1971] NZLR 909.
30. Sale of Goods Act 1908, s 27(2).
31. Especially since the doctrine of "reputed ownership" was abandoned in the Insolvency Act 1967.
32. Cf *Sandeman & Sons v Tyzack and Branfoot SS Co* [1913] AC 680, 694-695 per Lord Moulton.
33. *Re Bond Worth Ltd* [1980] Ch 228.
34. *Borden (UK) Ltd v Scottish Timber Products Ltd* [1979] 3 WLR 672, [1979] 3 All ER 961.
35. (1815) 3 M & S 562, 105 ER 721.
36. "An abuse of trust can confer no rights on the party abusing it, nor on those who claim in privity with him": at 574, 725 per Lord Ellenborough CJ. Cf *Re Hallett's Estate*, supra, at 727.
37. *Dexter v Mitcalfe* [1938] NZLR 804 (CA).
38. Eg, Scott, supra n 8, 481; Goode, supra n 8, 367-368.
39. Eg *Scott v Surman*, supra n 22, at 401-402, 1236; *Winch v Keeley* (1787) 1 TR 619, 623, 99 ER 1284, 2286.
40. *Gladstone v Hadwen,cfl (1813) 1 M & S 517, 105 ER 193, at 526,197 per Lord Ellenborough CJ; cf Scott v Surman*, supra n 22 at 402, 1236 (minority view, which gradually came to prevail in the eighteenth century).
41. See now Insolvency Act 1967, s 42(3).
42. (1708) cited 1 P WMS 318, 24 ER 406.
43. *Sinclair v Brougham*, supra, at 420-421.
44. See 3 Holdsworth, *History of English Law* (5th ed 142), 426-428; Milsom, *Historical Foundations of the Common Law* (1969), 235-243; cf Simpson, *History of the Common Law of Contract* (1965) 313-314.
45. Milsom, supra at 236, points out that a successful action in account was "a sufficient foundation for an action of debt", though the plaintiff's rights were at one stage in history enforced differently. It will be recalled, however, that the action of debt was not clearly distinguished from that of detinue, which implies to us a proprietorial claim; ibid, 219-233; Simpson, supra n 44, 75-80. We should be careful in looking back to those times with modern eyes.
46. 8 Holdsworth, *History of English Law* (2d ed 1937) 88-98. On the relationship between account and indebitatus assumpsit, see Stoljar, (1964) 80 LQR 203, where the matters referred to in the preceding notes are covered in detail.
47. Langdell, (1889) 2 Harv LR 241, 253-257.
48. *Moses v Macferlan* (1760) 2 Burr 1005, 97 ER 676, at 1008, 678.
49. A comparable development is the common law action of conversion, developed as an alternative to the older action of detinue.
50. Cf 1 Holdsworth, *History of English Law* (7th ed Rev'd 1956) 458-459.
51. See eg, *Burdett v Willett* (1708) 2 Vern 638, 23 ER 1017; *Ex p Chion* (1721), noted 3 P Wms 187, 24 ER 1023; *Ex p Sayers* (1800) 5 Ves 169, 31 ER 528; *Hassall v Smithers* (1806) 12 Ves 112, 33 ER 46.
52. Goff & Jones, supra n 6, ch 3.
53. Ibid, ch 9.
54. Eg *Solle v Butcher* [1950] 1 KB 671.
55. Eg *Cundy v Lindsay* (1878) 3 App Cas 659.
56. This is implicit in the trite proposition that a trustee in bankruptcy takes "subject to equities", but there is little authority. Most cases of rescission will involve money paid by the rescinding party which would usually be unidentifiable and hence beyond reach of a tracing remedy.
57. Cf *Coleman v Myers* [1977] 2 NZLR 225, 360-361.
58. See *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] QB 705; *Pao On v Lau Yiu Long* [1980] AC 614, 635-636.
59. See *Rogers v Ingham* (1876) 3 Ch D 351, 355.
60. *Kemp v Pryor* [1802] 7 Ves 237, 32 ER 96, at 250, 101 per Lord Eldon.
61. 3 Holdsworth, supra n 44, 428; cf 8 ibid, 88; Goff & Jones, supra n 6, 6-8
62. But cp the order made in *Sinclair v Brougham*, supra, [1914] AC at 460.
63. *Miller v Race* (1758) 1 Burr 452, 97 ER 398.
64. Goff & Jones, supra note 6, ch 32.
65. See Langdell, supra note 47, at 242-250 for a detailed description of the requirements of the action of account.
66. *Lister & Co v Stubbs* (1890) 45 Ch D 1 (though the decision has been criticised).
67. Cf *Banque Belge pour l'Etranger v Hambrouck*, supra n 13 (though there was a fiduciary relationship in that case, it seems).
68. Frustrated Contracts Act 1944.
69. Goff & Jones, supra n 6, ch 23.
70. *Fibrosa Spolka Akcynja v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32.
71. See *Craven-Ellis v Canons Ltd* [1936] 2 KB 403.
72. *Brewer Street Investments Ltd v Barclays Woollen Co Ltd* [1954] 1 QB 428, 436; *Way v Latilla* [1937] 3 All ER 759.
73. *Avondale Printers & Stationers Ltd v Haggie* [1979] 2 NZLR 124, 160-166. Other remedies are the equitable liens (*In re Whitehead, Whitehead v Whitehead* [1948] NZLR 1066, 1072), or a monetary award in quantum meruit, (*Deglamn v Guaranty Trust Co of Canada* [1954] 3 DLR 785).
74. *Hussey v Palmer* [1972] 1 WLR 1286, [1972] 3 All ER 744.
75. *In re Sharpe; ex p Trustee v Bankrupt* [1980] 1 WLR 219, [1980] 1 All ER 198.
76. Cf Goff & Jones, supra n 6, 62; cf at 364. But the authors evidently have difficulty even with *Sinclair v Brougham* itself, when they advance this view.
77. *Fibrosa*, supra n 68, at 58; cf Contractual Remedies Act 1979, s 8(3).
78. 8 Holdsworth, supra n 46, 93-94.

Sentences for cannabis offences

Peter Haig

The Court of Appeal has recently been at pains to establish guidelines, based on its own decisions in such cases, for appropriate sentences to be imposed on those convicted of trafficking in cannabis, and on those convicted of cultivating it. This article sets out the current position in the light of the recent cases.

Supplying cannabis

THE defendant in *R v Smith* [1980] 1 NZLR 412 had been charged with supplying two bullets of cannabis to a 16-year-old girl. Having been convicted and remanded on bail for sentence, he absconded and proceeded to undertake small-scale cultivation of cannabis. On being apprehended and convicted on the cultivating charge he was sentenced to one year's imprisonment. He was also sentenced to four years' imprisonment, concurrent, on the supplying charge, and he appealed against the four year sentence. The Court of Appeal reduced that sentence from four years to one year, cumulative on the one year sentence for cultivating, thus making an effective total term of two years.

In the course of its judgment the Court of Appeal, with a view to establishing the pattern of sentencing in cannabis-dealing cases, listed levels of recent sentences approved by the Court of Appeal in cases of trafficking in cannabis.

To this list may now be added the following cases:

10. *Rogers* (CA 113/80): Judgment 24 September 1980.

Possessing 400 Buddha sticks admittedly for supply. Sentenced to six months periodic detention and probation. Though the Court of Appeal declined, in fairness to the defendant, at that stage (four months after sentence) to substitute a sentence of imprisonment, it described the Judge's sentence as "manifestly inadequate", and stressed that in drug trafficking cases very little allowance can be made for the circumstances of individual offenders.

11. *Ford* (CA 47/81): Judgment 2 September 1981.

Two sales of cannabis and cannabis plant for a total of $1,850, and subsequent agreement to supply 1000 or more cannabis bullets for up to $10 each. Sentence of 12 months imprisonment increased to three years.

Cultivating cannabis

In the case of *R v Dutch* (CA 14/81: Judgment 7 August 1981) the Court of Appeal increased from 18 months to three years the sentence of imprisonment imposed on the defendant who had been convicted of cultivating cannabis on a large scale. A plantation had been laid out in a remote area with a sophisticated irrigation system and camouflaged from the air. About 1000 plants were cultivated, and the 752 plants recovered by the police had a market value of at least $20,000.

The Court in considering this appeal decided to follow the example which they had set in *R v Smith* (supra), by listing brief particulars of nine recent cases in which that Court had been called upon to review sentences in cases of cannabis cultivation. These are set out below, as appearing in the judgment.

1. *Beach* (CA 177/77; Judgment 7 April 1978)

A small number of plants were cultivated in a wardrobe in the appellant's home. He was a secondary party to the offence. A sentence of Borstal training was upheld.

2. *Edwards* (CA 30/78; Judgment 16 August 1978)

The appellant participated in the very large-scale cultivation of plants involved in the case of *McNab* (see below). He did not play any dominant part in the enterprise and was not the initiator. A sentence of 5 years' imprisonment was for that reason reduced on appeal to 3½ years.

3. *Collins* (CA 65/78; Judgment 8 September 1978)

One hundred and thirty plants were being cultivated, and the appellant was not the principal party in the venture. A sentence of 18 months' imprisonment was upheld.

4. *McNab* (CA 141/78; Judgment 1 May 1979)

This case involved the conversion of a wool-shed in a remote rural area into a hot-house which was lined with aluminium foil and there were installed heaters, fertilizers, flourescent lights, an irrigation plant and the like. 1350 plants were found to be growing. This was an elaborate project which appeared to have been designed to operate over an extensive period of time. A sentence of 5 years' imprisonment was upheld.

5. *Skiadas and Vrettos* (CA 103/79; Judgment 5 December 1979)

This was a plantation in a remote rural area. There were discovered 489 growing plants and 83 seedlings. A sentence of 2½ years' imprisonment in each case was upheld.

6. *Rodgers* (CA 228/79; Judgment 6 March 1980)

The appellant had converted a basement in his house to a hot-house supplied with heating appliances and plant nutrients. 40 plants were found to be growing. This was not a commercial operation, but the plants were intended not only for use by the appellant but for supply to some of his friends. A fine of $7,000 was upheld.

7. *Rose* and *Finlayson* (CA 83/80, CA 131/80; Judgment 10 October 1980)

Several cannabis plantations had been established by the appellants in a remote area of Northland. There was an irrigation system and the plants were fertilised and sprayed. The cultivation was described by the sentencing Judge as a "carefully planned horticultural operation". At least 1865 plants were involved. The sentencing Judge was told that the estimated value of the crop was to the order of $250,000 whereas it was agreed on appeal that the true estimated value was about $85,000. Each of the appellants was treated as a first offender. The sentences appealed from were 4½ years in the case of *Rose* and 5 years in the case of *Finlayson*. Each sentence was reduced by 1 year by reason of the erroneous information given to the sentencing Judge as to the value of the cannabis involved. Accordingly the sentence passed on *Rose* was amended to 3½ years, and on *Finlayson* to 4 years.

8. *Dunlop* (CA 68/80; Judgment 21 November 1980)

114 plants were found growing in a disused fowl-house on the appellant's property. Appliances for heating and supply of water had been fitted. The appellant was not the originator of the scheme but had been a willing party to it. A sentnce of 18 month's imprisonment was upheld.

9. *Comer* (CA 245/80; Judgment 3 June 1981)

This case involved two charges of cultivating cannabis on separate dates. The first charge involved 56 plants and about 300 cannabis seeds, and the second charge involved six plants in pots and about 100 seeds. This was an unusual case in that the appellant was the founder of a religion to which there were in due course attracted some 200 to 300 adherents in the Auckland area. It appeared that the appellant's church was founded upon conventional Christian philosophy except that it advocated the use of psychogenic drugs — cannabis and LSD — as a means of enlightenment. The plants were grown by the appellant exclusively for dispensing to adherents of this church, and there was no profit motive. Concurrent sentences of 9 months and 12 months' imprisonment respectively were upheld.

Later in the judgment the Court laid down three broad categories for this class of offence, in the following words:

1. At the lowest level of culpability are cases where the offender has cultivated a few plants on his own property exclusively for his own use. Sentences for cultivation to that extent have not been considered by this Court, as obviously they will normally be dealt with by a fine or some other form of non-custodial penalty in the District Courts. But there will be offences of a more serious kind in relation to non-commercial cultivation where terms of imprisonment or heavy fines will be appropriate. Suitable examples are the cases of *Rodgers* and *Beach* already referred to.

2. The second class of offending involves cultivation for commercial purposes where there will be a large number of plants, running into scores or hundreds, very often growing in a small prepared plot of ground in a remote region, and accompanied by the object of deriving a substantial profit from harvesting and sale. Such cases are normally of the type which involve small ventures engaged upon for the purpose of generating a substantial profit on one occasion only, and are illustrated by such cases as *Collins*, *Dunlop* and *Skiadas* where a sentence of imprisonment must be the ordinary result and where the severity of sentence will in general vary in accordance with the size of the crop under cultivation.

3. The third and most serious class of offence of cultivating cannabis is represented by cases where the cultivation is on a very large scale normally involving 1,000 plants or more. This measure of cultivation is sometimes effected by converting a large building into a hot-house equipped with sophisticated cultivation aids of the type used in *McNab's* case, and where such installations may appear to disclose either intent or ability to use the established system of cultivation as a continuing operation. But cultivation on a similarly large scale may also be achieved by outdoor plantations in remote areas, as in the case of *Rose* and *Finlayson*, and we see no difference in the methods employed where the expected harvest is estimated to realise financial returns of $50,000, $100,000 or more. In the case of *McNab*, who by contrast with his associate *Edwards* was a principal party to the venture, a sentence of 5 years' imprisonment was upheld by this Court as opposed to a maximum sentence of 7 years, it being considered that although the case was in the most serious category there must be, in accordance with settled principles,a necessary reduction from the maximum penalty so as to allow for cases of re-offending and other special circumstances.

The Court emphasised that the three classes or divisions were not to be regarded as capable of exact demarcation, and that the particular circumstances of any case may indicate a higher or a lower sentence as appropriate.

In conclusion, a study of these cases indicates the strong concern of the Court that as far as possible in this difficult area there should be reasonable conformity in the sentences imposed for comparable offences.

THE NEW ZEALAND LAW JOURNAL

CORRESPONDENCE

Correspondence should be addressed to: The Editor, New Zealand Law Journal, CPO Box 472, Wellington.

"Simpler Drafting"

DEAR SIR

As a member of the Conveyancing Practice Sub-Committee of the Auckland District Law Society I must object to your editorial comments in the December issue of the Law Journal under the heading "Simpler Drafting". I can assure you that the Committee was continually reminding itself that it wanted to produce a document which could be read by the layman and that "legalese" was to be avoided.

The Committee considered having a one-page agreement with standard conditions held by the Law Society incorporated by reference, but rejected this idea specifically because it was felt that Vendors and Purchasers should be entitled to have a copy of their agreement in its entirety and the language employed is that which was felt appropriate to the case.

Might I suggest that you read the agreement again and consider the language used. The agreement is long and somewhat complex but that is because we wanted to provide a complete code for the many concepts included in it ie payment of the deposit, procedure for settlement, remedies on default, insurance, etc.

I am sure most members of the Committee will feel a little bit flattered by your comments that "whatever its substantitve merits no one could claim that it was readily understandable . . . ." Most of us would have thought that it would have been its substantive merits which attracted the more critcial comments rather than how it reads. No member of the Committee would suggest that the agreement is perfect in any respect and if you or any of your readers would like to contribute a simplified version of any of the provisions which achieves the same objects I am sure it will be appreciated.

Yours faithfully

ALAN JENKINSON
Auckland

"[The Assistant Editor would like to reassure subscribers that he did read the draft form of agreement with great care. He also attended the local seminar on it, and (in his personal capacity) wrote a lengthy letter to the Auckland District Law Society last October with 14 specific suggestions for reform. — Ed]"

Example

DEAR SIR

On pp 526-527 of the 1981 New Zealand Law Journal you had an editorial comment on the need for simpler drafting and you invited contributions. I would like to offer a small example which may be of interest.

Where personal articles are left by Will for distribution it is common to follow a precedent similar to that found in Nevill's Will-Draftsman's Handbook, Third Edition, to the following effect "AND I REQUEST X but without in any way creating a trust or other equitable obligation to distribute all those articles in accordance with any list I may deposit with my Will or hand to him before my death and in the absence of a list then in accordance with any wishes I may have made known to him . . .".

The following shorter form would appear to be quite adequate, namely "AND I DESIRE but do not direct X to distribute the said articles in accordance with any instructions I may have communicated to X . . .".

I found the shorter format in an American Will which, in other respects, was far more prolix than most Will drafting in New Zealand.

In your Editorial you suggest that "if reform comes in this field it can come only from within the profession." Although I would agree that this is generally the case there are some areas where statutory improvements could prepare the way, such as the Schedules to the Property Law Act, Land Transfer Act, Companies Act, and the Chattels Transfer Act.

Finally I cannot resist suggesting that the Consumers Institute might extend its campaign to the College of Arms, as the description of the New Zealand Law Society Arms on p 527 would make even the traditional draftsman gules-faced with embarrassment.

Yours faithfully

J M von DADELSZEN
Hastings

Section 40 is the forerunner not only of the present s 12 of the Electoral Act 1956, as Professor Brookfield says, but most of it is also the forerunner of s 11 of that Act (s 40 having been repealed in 1902 and replaced in an amended form by a provision which eventually became s 3(1) and (2) of the Electoral Act 1927, subs (1) of which was completely re-drafted in 1956 as the present s 11). Section 11 reads "The House of Representatives constituted as part of the General Assembly by section 32 of the New Zealand Constitution Act 1852 shall consist of . . ." (and then follows a description of its membership). This is clearly not an establishing provision, it is directed to identifying the body to which it is referring, and describing its membership. Section 12 of the Electoral Act (which Professor Brookfield quotes) refers to an already existing House of Representatives and does not itself create the institution. Its subsequent reference to the length of time the House is to run must depend upon more fundamental provisions bringing the House into existence; provisions which in Professor Brookfield's contention were formerly contained in the first part of s 40 of the Constitution Act, but which are not in its successors. If s 32 of the Constitution Act does not create the House of Representatives there is no provision in force at the moment which does. If, as Professor Brookfield thinks, the original s 40 was the provision which enabled the Governor to establish the House periodically, he must have lost that power by the emasculation of s 40's successor in 1956. (One would also have expected the Governor's Proclamations after 1902 to have referred to the Electoral Acts as the specific authority for the summoning of the House of Representatives whereas they continued to refer to the Constitution Act.) If the House is not already a statutory creature, investing the original s 40 with the significance Professor Brookfield contends for means that there is now no statutory power to call it into existence.

Professor Brookfield refers also to s 33 of the Constitution Act which provided for "constituting the Legislative Council". In Professor Brookfield's view, it was the Governor, acting under that section who brought the Legislative Council into existence.

This raises the question of the effect of dissolution on the Council. There is no selective power of dissolution in New Zealand. The Governor-General dissolves the General Assembly, not the House of Representatives, as he does, for example in Australia (s 5 of the Australian Constitution.) In the case of double dissolution he has power to dissolve "the Senate and the House of Representatives" — s 57 — the dissolution is not of the Federal Parliament. If the effect of the dissolution of the General Assembly is to destroy the House of Representatives as an institution, did it equally destroy the Council (and the Governor)? That it did not destroy the Council is clearly implicit in ss 33 and 34 of the Constitution Act. Members held office, at first for life, later for seven years, and were not appointed to a different Council following each election. Dissolution of the General Assembly then does not inherently involve the destruction of the individual houses of the legislature. What s 33 was doing when it provided for the "constituting" of the Council was, it is submitted, providing for the making up of the Council's membership (by appointment), not bringing it into existence. Similarly s 40 was providing for the periodical making up of the membership (the constituting) of the House of Representatives (by providing for an election), not for the periodical bringing of it into existence as an institution.

This aspect of dissolution in New Zealand, that it is in its own terms a power to dissolve the General Assembly, and that dissolution of the umbrella body does not necessarily entail dissolution of its component parts (although it sets in train the electoral system) was remarked on by Quilliam J, and with respect I consider that it is significant, especially when one asks what is the present authority for the House's existence.

Finally, Professor Brookfield refers to the Crown's advisers ignoring the cogent criticisms of Quilliam J's judgment. I entered upon this question, following Mr Joseph's article, as an interested parliamentary lawyer. In my official position I owe duties to the House of Representatives as an officer of that House, in other words to a different part of the General Assembly from the Crown. The "Crown's advisers" may well be able to advance a better defence than I, but I would not like it to be thought that my contribution represents an attempted justification by "the Crown's advisers" of Quilliam J's decision.