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Penal policy and sentencing

IN his book *The Judge* (Oxford University Press), Lord Devlin describes most felicitously the opposing influences bearing on penology:

> Penology falls between two ancient disciplines. There is the discipline of medicine, where the sin is not to cure where you can, and there is the discipline of the law, where the sin is to try to cure the man against his will. Medicine operates upon the generally valid supposition that a man wishes to be cured and that he is for that purpose willing to stay in hospital until the doctor permits his discharge; the doctor naturally is more interested in the cure than in the discharge. The law on the other hand is primarily concerned with the man's liberty. It will not without warrant allow him to be detained against his will so that he may be cured, whether it be of a disease, of an addiction, or of subversive thoughts. In the case of the criminal the warrant is for the exaction of the debt which the criminal has incurred to society. The measurement of the debt is not easy, but one thing is clear: the size cannot be affected by the creditor's promise to use it in what he considers to be the interests of the debtor (p 29).

Lord Devlin goes on to blast the notion that Judges should undergo a sentencing training course in subjects including penal theory and criminology — a course proposed in a Working Paper issued under the auspices of the Home Office. The Judge is not a specialist, he argues. He is there to hear matters put before him and to make decisions based thereon. Furthermore:

> Everything that might affect the judgment must be known to counsel so that they can comment on it and challenge it if they wish. This does not mean that the evidence and argument in Court may not be viewed in light from the background, but that there must be a common source of light. If the Judge perceives some point that counsel has not taken, he must be able to put it to counsel for comment. If in this "highly controversial field" he is tempted to apply the Puffberg theory of recidivism (if there be such a thing), but doubtful to what extent it has been demolished by Dr Pinkerton-Smith, it is useless to discuss the matter with a barrister who has heard of neither. But if it might affect the sentence he is about to pass, that is what he should do. In short, if the Judge is to become a penologist, under the existing system counsel must become penologists too (p 47).

This elegantly written and forcefully argued book may be quoted at length but to do so would diminish the enjoyment of those wishing to read it in full. The main point in mentioning it here, however, is that reading it (and particularly chap 2 on "The Judge as Sentencer") throws into sharp focus the function of a *Judge* as a *sentencer* and will tend to make readers of the Report of the Penal Policy Review Committee 1981 very sensitive to that function.

The philosophy underlying the Report may be summed up in a nutshell. Prison is expensive and does little to reduce the likelihood of a prisoner re-offending. Other non-custodial penalties are less expensive and, the committee hopes (or assumes?), will reduce the likelihood of re-offending. The move is away from a penal approach and more towards a rehabilitative approach; and towards achieving the aims of our penal policy — protection of person and property — not by locking offenders away but by adopting measures that while punishing will do so in a way that reduces the prospect of the prisoner re-offending.

In so far as this involves making the punishment fit the criminal as much as the crime it is nothing new. The criminal justice system has been moving this way for years. But the sentencing Judge will be much more concerned to match a wider range of sentences to the circumstances of the offender — and it is here that, unless a marked change in the nature of our judicial system is to be introduced unawares, we must watch carefully to ensure that Judges are not asked to cross the line between penalising and curing; or to conducting an adversary system for convicting and an inquisitorial one for sentencing.

This observation is prompted particularly by chap 24 of the Report which recommends the establishment of a Sentencing Research Council. Its functions would be:

(a) To provide Judges and others involved in the sentencing process with information about the purpose of specific penal measures as they are introduced;
(b) To provide them with information about the content of penal measures and their effectiveness;
(c) To provide them with cultural and other relevant information to help in choosing the most effective way of dealing with offenders belonging to minority cultural and ethnic groups or those with special problems;
(d) To provide them with statistical and other services to assist them to carry out sentencing functions effectively and to promote an appropriate level of consistency in sentence;
(e) To provide such other information and services necessary to or desirable to assist the Courts in developing and applying an appropriate penal policy in New Zealand (pp 157-158).

Undoubtedly this information would immeasurably help Judges to balance the many, often conflicting, factors that bear on a sentence. But the crucial question we must

ask ourselves is — how are they to receive that information? Is this information to be presented as part of a report to the Courts from the probation service — a report that will be available to and may be commented on by the defence — as chap 20 recommends? Or is to be published in a publicly available form and so form part of the "common source of light" — as seems anticipated by paras 428-430? Or is it to be solely for the enlightenment of the judiciary — this being the emphasis laid in paras 422-423?

This question is not addressed in the Report yet the answer to it may bring about a profound change in the nature of our judicial processes and in the way our Judges carry out their functions. This change may be for the good, but if so it should be by design not accident.

Unfortunately the proposals in chap 24 may easily be overlooked for they are not included in the Summary of Recommendations.

There is another matter in chap 24 that needs thought. The establishment of regional organisations is proposed, to make recommendations for pre-release into the community and generally to supervise community-based sanctions. This Council "could include a District Court Judge". Pre-release decisions would be made "by a committee of the Council presided over by a District Court Judge." Apart from its bearing on sentencing, is what happens to a prisoner after sentence any concern of a Judge? This is surely a matter of rehabilitation — of cure; and a matter of administration.

In effect this Report does not really address itself to the differing functions of the lawyer or Judge on the one hand and the penologist on the other. It looks broadly at penal policy and little at the judicial system that is central to its operations. This comment is not intended to detract from the valuable recommendations made but rather to draw attention to the need for care in the manner in which those recommendations are given effect.

As indicated at the beginning, two different, but related disciplines are involved and a final quotation from Lord Devlin may help to keep the distinction between them in mind:

> The sentence must not be longer than is justified by the gravity of the crime and must not fall below the least that retribution demands. This is the lawyer's objective. The penologist's objective is to send the prisoner back into the world changed for the better (p 30).

The Judge is concerned with the former.

Tony Black

Police inquiries into complaints

The closing of the file on the "clowns" incident raises again the question of whether the police should continue to conduct their own inquiries into complaints arising out of the conduct of its officers. This need not invoke the standard argument for or against the police. On the contrary, one can understand the difficulty faced by police investigators who must sit in judgment upon their own colleagues. The clowns incident makes this point all too clearly. The suggestion is that the responsibility should fall on an independent body.

The incident in question arose out of police beatings of three anti-tour protestors dressed as clowns. No one has disputed that the beatings took place. No responsible person has suggested that the clowns provoked the incident. However, the culprits have not been identified and the file is now closed.

One can sympathise with the pressures the police were under. The circumstances of daily confrontation over several weeks would have tested the mettle of anyone. It is indeed fortunate that incidents of the clowns variety were isolated, and not a standard police practice, as in many other jurisdictions. In the United States, a commission found that the behaviour of Chicago's police force at the 1968 Democratic Party Convention amounted to "a police riot." In Great Britain, one recalls the recent death of New Zealander Blair Peach, allegedly at police hands.

Nevertheless, in New Zealand, there is concern over police behaviour, whether in extraordinary situations such as the Springbok tour, or in the day-to-day business of keeping the peace. Certainly the stories told by trial lawyers of the way they or their clients have been treated suggest a less than satisfactory state of affairs. If there are few complaints, possibly this reflects a lack of confidence in existing avenues of redress.

In the wake of the Brixton riots Lord Scarman, who conducted a judicial inquiry, was there struck by the public loss of confidence in the procedures for investigating complaints against the police. In view of concern in New Zealand — symbolised by the clowns incident but demonstrated many times over in the past year — Lord Scarman's observations may be apposite to our situation; notwithstanding our comparative good fortune, his recommendation of an independent body to investigate complaints against the police will be regarded by many as worthy of consideration in New Zealand. This body could be totally independent, as is being suggested for complaints against the Broadcasting Corporation or, alternatively, an aura of independence could be introduced by the appointment of a lay observer as proposed for disciplinary proceedings against lawyers. This would not only ensure that justice would better be seen to be done but would also lift a heavy and invidious burden from the police themselves.

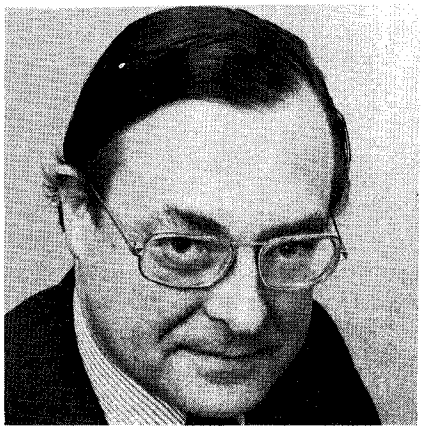
John McManamy

Coincidence or Prescience?

Readers may care to ponder the appropriateness of placing of the filler "Misuse of Judges" at [1972] NZLJ 279.

Chips today for jam tomorrow

Simon Chalton



The author is a solicitor from Leeds who has had wide experience in the application of computers in law offices. He is a member of the Law Society's special committee on general services and a director of the National Law Library Ltd. This masterly paper was presented at the New Zealand Law Society's Triennial Conference 1981, and is reproduced by courtesy of the Conference Committee.

Mr Chalton has himself designed computer systems for lawyers, and he provides a wealth of sage and stimulating counsel for those entering or already afloat on the exhilarating but confusing seas of office computerisation.

CHIPS TODAY — *How are they stacked for the legal profession?*

1 The Rule of Law at risk?

THE Rule of Law is the instrument by which the weak control the strong. It is an instrument which is broadly exercised in free societies by Parliaments, Courts, Judges and especially by practising lawyers. The advice they give their clients operates on those clients' actions: it restrains unlawfulness and promotes the pursuit of private interest by lawful means. Without a vigorous, effective and economically independent legal profession the Rule of Law would fail.

To be effective, the legal profession must be accessible. The economics of legal practice are depriving many citizens in the western world of access to the law because the combined effects of inflation, complexity in the law and the labour-intensive nature of legal work have pushed costs to levels which the private client is unable or unwilling to pay.

To be economically independent, the legal profession must undertake the bulk of its work at levels which are self-financing. Pro bono work, if it absorbs more than a limited proportion of a firm's resources, will threaten the firm's economic survival and independence.

To be politically independent, the legal profession must derive the greater part of its income from its clients and not from the State. A subsidised legal service is at risk of becoming subservient to its State paymaster.

The Rule of Law is therefore jeopardised if practising lawyers cannot give their clients the services such clients need at prices the client is willing to afford. Experience, backed by recent economic surveys of the legal professions, suggests that this jeopardy is drawing near.

2 The practising legal profession in New Zealand

Distribution of the profession by size of firm

No of Principals (Barrister and Solicitors)	No of Law Firms	Percentage
1	242	24.8
2	220	22.6
3-5	375	38.5
6-10	122	12.5
11 plus	16	1.6
	975	100.0

Distribution of gross fee income by size of firm

	Firm A	Firm B	Firm C	Firm D
No of Principals	1.91	3.0	5.6	12.7
Total annual Gross Fees per firm	$100,000	$200,000	$500,000	$1,500,000
Gross Annual Fees per Principal	$52,531	$66,666	$89,285	$118,110
Gross Fees from:	%	%	%	%
Conveyancing	58	51	41	32
Probate	12	14	9	5
Litigation	16	19	17	24
Commercial, Company, Tax	8	14	30	35
Other	6	2	3	4
	100	100	100	100

From these figures the following conclusions may be drawn:

Over 85 percent of the law firms in private practice in New Zealand comprise five or less principals.

Gross fees per principal fall dramatically the smaller the firm, the gross fees per principal of a 12-principal firm exceeding the gross fees of a sole practitioner by over 100 percent.

The smaller the firm, the greater its proportionate dependence on conveyancing and probate fees. The sole practitioner draws approximately 70 percent of his fee income from these sources, the 12-principal firm only 37 percent.

Most of the expenses of a law office are standing charges and they are incurred on a "per fee earner" basis. Whether the firm earns good fees or not in a given year, rent, salaries, library and equipment costs, general overhead expenses and other outgoings must be paid each month as they fall due. Fees above the level required to meet such expenses represent the partners' remuneration, but if the firm earns fees below this level the partners work for nothing and pay for the privilege of doing so. The gearing effect on partners' earnings can be drastic and is not reflected in the "fees per principal" figures set out in the above tables. "Fees per principal" for the 12-principal firm exceed the sole practitioner's gross earnings by over 100 percent. Yet firms of 11 and more principals represent less than two percent of the total population of firms.

Smaller firms have an undue proportion of their fee income dependent on conveyancing and probate work. In the UK there is a risk of political attack on fee structures in these areas. If their conveyancing and probate fees were reduced how many smaller firms would be subsisting at profit levels which could not support an adequate level of service or attract the right kind of young men and women? What can be done to increase the fee earning capability and profitability of the smaller firm and to reduce its dependence on income derived from conveyancing and probate work? Are such firms in a poverty trap which prevents them from enhancing the services they offer? Is the work they are asked to undertake other than conveyancing and probate so complex and so meagre in fee yield that it can only be undertaken at marginal profit levels? If such firms disappear, how will the communities they serve have access to the law? The upper branches of the legal practice tree may be flourishing: how long can they do so if the roots decay? And without lawyers in small firms in general practice, what happens to the Rule of Law?

My questions posed in the preceding paragraph are questions only. My knowledge of the practising legal profession in New Zealand is second-hand and is marginal. Perhaps the answers to my questions are not as I fear they may be: perhaps I am unduly conditioned by my experience as an English solicitor. In so far as I draw conclusions in this paper about the economic state of the practising legal profession, such conclusions are based on my own experience in England and on talking to lawyers from other jurisdictions about their particular problems of practice economics. If the concern I express is ill-founded, the solutions I propose (which are based on my own experience and the experience of others) are still valid. If there is no bad news, the good news is even better: if all legal practices are thoroughly profitable, and therefore secure and independent, here are ways in which they can become more so and in which they can improve the range, quality and profitability of the services which they offer.

I have no first-hand knowledge of the economic problems of the practising Bar in England. Of the 3,779 lawyers in private practice in New Zealand I am told that only 111 practise as barristers only. I judge that their problems, if any, are likely to be broadly equivalent to those of New Zealand solicitors and I hope therefore that New Zealand barristers will excuse me if I refer in the remainder of this paper only to solicitors.

3 How can the computer be relevant to the solicitor's practice?

Before attempting an answer to this question it may be helpful to summarise the solicitor's main problem areas.

(a) Time, the irreplaceable and unexpandable asset

Each solicitor's personal time resources are limited and unexpandable. Conservation of time can be encouraged by avoiding its waste and by personal self-discipline.

A growing recognition of the need to cost time (though not necessarily to charge by reference exclusively to its cost) has led to public expectation that solicitors should maintain time recording systems.

Both the effective use of time and the use of time costing techniques are encouraged by simple (eg, undemanding) methods of time recording, but managing time records is itself difficult.

(b) Capital: where do we find it, and how do we service it?

Inheritance apart, solicitors are not normally asset-rich and the accumulation or raising of capital is burdensome.

Premises apart, the largest single capital requirement in a solicitor's practice is for the financing of work in progress.

Working capital (required to finance work in progress, unbilled disbursements and unpaid bills) expands as a practice grows, and is usually found by retention of after-tax income. The resulting strain on personal cash flow can inhibit the living standards of existing partners, can place substantial obstacles in the way of the retirement of partners whose retained undrawn profits are too high and can substantially discourage incoming partners.

(c) Profits: are they good enough?

The Law Society of England and Wales' 1976 Remuneration Survey disclosed an average annual decline in profitability approaching 2 percent per annum from a median base of 43 percent in 1973 to 36 percent in 1976.

Since 1976, the effect of inflation on office costs has continued to increase the capital required to maintain a constant level of work in progress.

Pressure on profit margins and on capital has increased the need for office management, which in itself has generated new sources of expense.

Inflation has operated, not only on office costs, but on the real value of fees fixed by statute or otherwise and on public expectations about the levels of solicitors' costs. Accordingly, while some sections of the solicitor's practice have been required to continue undertaking work at increasingly unprofitable fee levels, the public has been unwilling to permit the economic burden of maintaining the office to be transferred to other departments of practice not subject to such controls.

(d) Succession: will the right people come and stay?

The English Law Society's 1976 Remuneration Survey has disclosed

that senior partners typically carry more than their fair share of the burdern of providing capital for their firms. It follows that, on their retirement, their continuing and junior partners will be obliged to find subtantial capital funds from other sources in order to permit the repayment of capital due to the outgoing senior partners.

The prospects of financing the provision of such additional capital from outside sources at full commercial rates out of declining profit ratios are not good and are likely to be reflected in further declining profit ratios and reduced standards of living.

Those junior partners who borrow substantially in order to repay a retiring partner's capital may find themselves with a lifetime mortgage millstone of borrowed capital round their necks, and an inability ultimately to repay the borrowing. If prospects are poor, will able young people accept the burden?

4 How can the computer help?

(a) The solicitor can use a computer (and in this paper I use the term "computer" as including electronic word processors, which are computers adapted to the special task of processing text, as opposed to numbers) in the following ways:

- to back up his library and information services with rapid, easy access to up-to-date statements of the law.
- to improve his document production and typing services.
- to undertake simple, routine transactions for him.
- to manage his work in progress and reduce his working capital requirement.
- to improve his costing, billing and credit control procedures.
- to manage his time and accounting records.

(b) Most of the solicitor's problems stem from inadequate profits, and the computer can help in these areas to reverse the current declining trend in profitability.

(c) Before we consider in detail how we should use the computer, we must know, in general terms, what it is and how it works.

5 Computer "Hardware" and "Software"

(a) Computer systems have exceptional abilities to receive, store, search, compute and output information.

(b) The computer itself is sometimes described as "a hardware configuration", comprising a central processing unit (CPU) and a range of connected peripheral devices. Most peripherals are input and output devices (for example, the visual display unit (VDU) which resembles a television screen with an attached keyboard) by means of which information is fed into and retrieved from the computer. Output in printed form is provided by high-speed printers connected directly to the CPU, or sometimes connected to the CPU through a VDU. In addition to such devices, the CPU is usually connected to a storage device (usually a magnetic disk or disk pack) called a "backing store" or "on-line storage," which holds information accessed by the CPU for computational purposes. The CPU itself represents the central "brain" of the computer, by means of which it undertakes the computing of particular transactions on information held in the backing store.

If prospects are poor, will able young people accept the burden?

Another important peripheral is the "modem" (modulator/demodulator) which converts the computer's electronic signals into signals capable of being transmitted down a telephone line, often forming part of the public switched telephone network. A second modem at a remote location can then receive and re-interpret such signals for reading into a connected computer terminal compatible with the host CPU. In this way, computers can be accessed and operated from remote terminals by means of the public telephone network: a facility which greatly enhances their power and usefulness.

(c) The computer's hardware is of no value without the necessary "software", which is of broadly three kinds.

- "Operating systems software" is a system or method of electronic commands which regulates the functions of the computer hardware (eg the receipt and storage of data, operation of the CPU, and output of data to print or other devices). Operating systems are usually designed specifically for particular machines and are provided by the machine's manufacturer.
- "Applications software," like operating systems software, is a series of electronic commands which control the function of the hardware but, unlike operating systems, do so in such a way as to perform particular computational operations (eg computing a payroll). There is virtually no limit to the forms of applications software which are capable of development, and it is in this area that the greatest difficulties and most challenging opportunities exist for useful employment of the computer.
- "Databases" are collections or libraries of text or numeric data stored in electronic form in a computer and sometimes transported between computers, either physically on disks or electronically by transmission over telephone lines or by satellite radio networks. Databases often comprise purely private information, and most computer users accumulate their own private databases. Databases are accessed and computed by means of operating systems and applications software, and the control of databases is in itself a challenging and important science. Databases, like other software, are vulnerable to "corruption" and loss if the computer holding them fails or "crashes", and standard copying procedures are used to protect against these risks.

6 The computer as an infallible idiot

(a) Although computers can "think" (ie compute) many times faster and more reliably than human beings, they are not capable of exercising imagination or creativity. They are also incapable of recognising an error otherwise than in terms of the precise instructions built into the relevant applications software.

(b) The creation of applications software must therefore be preceded by logical analysis of the problems to be resolved by means of the proposed software, so that every conceivable logical error is foreseen, analysed and avoided by steps within the software's programmes. Human beings exercise their own imagination through systems analysis and design before creation of the necessary applications software is undertaken by programmers. Programmers then convert the work of the systems analyst into electronic instructions which the computer will understand and faithfully follow.

(c) If instructions given to the computer include an error of systems analysis which is not inconsistent with some

other part of the software programme, the computer will faithfully follow and reproduce the error: if the error is inconsistent with some other part of the same programme, the computer will detect the inconsistency and will either corrupt the programme or produce faulty output. In either case, the resulting error in output will have been caused by human agency and not by the computer.

(d) Because of the computer's limited ability to detect faulty analysis or faulty programming, and because of the complexity of the necessary analytical and programming processes, faults of analysis and programming may lie dormant in otherwise mature software for many years. Such faults are called "bugs", and their late appearance might suggest unreliability in the computer. The existence of bugs is undeniable, but is comparatively rare in well-tried and regularly used software.

(e) Latent bugs and other deficiencies in software, combined with the continuing process of evolution which most good software undergoes in order to respond to the demands of its users, dictate a need for continuing software support services from systems analysts and programmers. Such systems analysts and programmers are essential to the effective control of faults in old software and to the evolution and development of the new software which is continually needed in order to achieve full value from the growing power of modern computers.

7 Hardware weaknesses and strengths

(a) In addition to its lack of imagination and creativity, computer hardware has the following major weaknesses:

- Compatibility between different items of equipment cannot be assumed. CPUs and peripherals of different manufacture, and sometimes from different ranges of equipment of the same manufacture, are often mutually incompatible, so that peripherals and CPUs cannot always be interchanged to meet the growing needs of a particular system user.
- Compatibility between successive ranges of equipment ("the upwards growth path") is comparatively rare. Although most CPUs can be "upgraded" by the addition of further peripherals, and sometimes by enlargement of the CPU itself, such enhancement is always ultimately limited. Comparatively few manufacturers design their ranges of equipment so as to be mutually compatible, and a user unable to expand his existing hardware may find himself committed to expensive and hazardous software conversions or rewriting when he moves to a larger machine.
- Computer memories are potentially unstable and can "lose" the records held in them. Computers hold their software in electronic form, and in the event, for example, of a power failure can lose or corrupt their applications software and databases. This risk is avoided by regular copying procedures which enable the database to be reconstituted, but in the last analysis the risk of its total loss is always present.
- Computing equipment quickly becomes obsolete. As advances in computer technology go forward, the useful life of much computing equipment, and in particular the CPU, is surprisingly short. Falling hardware prices and increasing hardware power combine to give a high rate of obsolescence and minimal second-hand values. Although computing equipment usually obsolesces before it is worn out manufacturers sometimes withdraw or price up their engineering support service for obsolescent equipment and thereby compel users to upgrade to more modern machines.
- Computing equipment requires skilled maintenance. Typically costing 10 percent per annum of a computer's original capital cost, annual maintenance charges can exceed the residual value of an older machine and as the purchase prices of new machines fall the cost of their maintenance increases as a percentage of their purchase price.

(b) Computing hardware has the following strengths:

- Its "power" to undertake reliable and complex processing on high volumes of data is impressive, and newer and more powerful machines are produced each year.
- The computer's processor operates at high speeds, and its output is often limited only by the comparatively slow speeds of print and other output devices. Such devices can be upgraded, and available print speeds are now potentially fast enough for any likely user requirement.
- The falling cost of hardware encourages growth in the market for computing equipment, which in turn is likely to lead to even lower hardware prices as the cost of development is spread over a wider number of users.
- Modern semi-conductor technology has improved the reliability of computers, and self-diagnostic features increasingly simplify the potentially difficult task of finding the source of a fault on those rare occasions when a hardware failure occurs. Although good engineering support is essential when a computer is used and relied upon in a critical application, hardware failure is becoming increasingly rare except when it arises from accident, interruption of power supplies or incorrect operation.

8 Software weaknesses and strengths

(a) A computer system is dependent on the quality of its software and such quality, as in most intellectual products, is variable. Software suffers from the following general weaknesses:

- It is always capable of improvement and, because of the presence of latent "bugs", is seldom perfected.
- Because of the many differing computer languages (not to be confused with human languages) in which software is written, and the many different machines which support different versions of standard software languages, software is seldom "portable" between machines of a different kind. Depending upon the differences between the machines concerned, software written for a given machine may require comparatively modest amendment to run on another kind of machine or, alternatively, may require complete rewriting at substantial cost and risk.
- Software is expensive to create and expensive to service. The increasing market for computer software and the limited number of adequately trained systems analysts and programmers available to satisfy the market have increased the cost of writing new software and the cost of maintaining existing software. The pace of development of new hardware has shortened the

life of existing software, and calls for the replacement of existing software in enhanced forms have added to the demands on available software services.
- Because software instructs the computer in minute detail, software design is complex and tends to be inflexible. Comparatively modest changes in computational requirement can result in a need for complete rewriting of a particular programme, or even of a complete suite of programmes.

(b) While acknowledging software's vulnerability in some areas, it is important to appreciate its considerable strengths:

- Its capability. Virtually every rational process likely to be applied to established facts is capable of analysis and incorporation into computer software, given the necessary computational power and funds for software development. Computers can now handle text and language, as well as numbers and statistics, and the concept of "artificial intelligence" is now being developed.
- Its potential portability. Although in practice computer programmes are seldom portable as between machines of different manufacture or different size (see 7(a) above), as between identical machines and as between some ranges of machines of a few manufacturers, software itself is physically transportable on disks or tapes, or may be transmitted from machine to machine over the public telephone network.
- Software may be copied electronically at high speeds, both as a security precaution against loss of the original and as a means of reproducing the relevant software for use on different machines.
- Subject to the risk of the existence of latent "bugs" in the software and on the assumption that software has been written from correct systems analysis, computational reliability is as absolute as the rules of logic.

9 The electronic Bob Cratchit

(a) Now that we have considered the computer's capability, let us see the advantages available if we can employ it to perform some of the repetitive, boring, work of the kind undertaken by Mr Scrooge's clerk and now necessarily performed by human beings in solicitors' offices.

- Bob Cratchit works slower, less well and less reliably than the computer.
- His memory is smaller and much less reliable than the computer's backing store.
- He can work on only one job at a time: the computer can work on several.
- It takes him a long time to learn new work: assuming that the necessary programmes are available, a computer can "learn" a new job instantly.
- He needs a holiday, though Mr Scrooge resented his having Christmas Day off and expecting to be paid for it: the computer needs occasional preventive maintenance, but nothing more.
- Bob Cratchit had a wife and family to support, and in an inflationary age would need regular pay increases: once bought or leased, the computer's capital cost is fixed and though charges for its maintenance may increase they are unlikely to represent substantially more than 10 percent of capital cost.
- Bob Cratchit did not need much office space and Mr Scrooge spent little on warming him. His latter day human counterparts expect rather more in office facilities, comfort and heating. The computer may need environmental air conditioning and dust controls, but modern machines are increasingly less environmentally sensitive and need less space generation by generation.
- The computer needs no pension or fringe benefit, requires no social security contributions and never needs to attend a grandmother's funeral.

(b) In short, the computer, other things being equal, is the ideal employee with substantial advantages over its human counterparts. You cannot, however, "tell" a computer what to do unless you have the necessary software. Happily, software is now available for lawyers so that they can employ computers to

- undertake time, accounting and management functions. Many such systems are now available, and I have had the privilege of sharing in the design and creation of one of them;
- calculate payrolls;
- search statutes, law reports and other legal sources.
- undertake debt collection. A system of this kind has been in use in my own office for over 10 years. It operates automatically by sending claim letters, issuing Court process, entering judgment and levying execution and is currently handling over 10,000 live claims. It also corresponds with Courts, clients and debtors and runs with a staff of seven. It can (and frequently does) handle profitably litigation for claims as low as $2. It proves dramatically the capability of the computer to deal professionally with complex documents and procedures and to handle effectively work which many lawyers would consider unprofitable.

(c) There are also good prospects that programmes will be developed to undertake or support

- standard conveyancing procedures.
- preparation of trust accounts and management of trust portfolios
- management of office archival and other records,
- preparation of standard companies documentation,
- diary and reminder systems

(d) Many well established word processing systems deal in whole or in part with some of these latter applications.

10 Do I need a computer?

(a) Unless you have some special application for which you think a computer is appropriate, you are likely to be considering installing one to undertake time recording, management and accounting functions. The following list of facilities available on some systems will help you assess your needs. If you allocate a weighting between 1 to 5 (5 most important) to those items not now available to you, you can score your own relative assessment of their aggregate importance to you:

- the ability to record time effectively,
- up-to-date financial accounting,
- daily balancing,
- automatic cheque writing
- automatic bank reconciliation,
- automatic draft billing,
- automatic credit control,
- the ability to charge and recover telephone calls, copying costs and other items of expense directly against the clients for whom such items are incurred,
- on-line branch accounting,
- management report under the following heads.
  (i) income, expenditure, profits and profitability (this month and year to date) with comparisons against

budget,
(ii) valuation of work in progress,
(iii) unbilled disbursements, aged by number of months outstanding,
(iv) unpaid bills, aged by number of months outstanding,
(v) office and client bank balances,
(vi) fee earners' management performances,
(vii) fee earners' other performances,
(viii) the relative profitability of different types of work,
(ix) Static matters
(x) matters exceeding a credit limit or an estimate of fees
(xi) matters requiring periodic billing,
(xii) disbursements or commitments incurred but unpaid.

(b) The maximum score on the above list is 105. Your response is subjective, but if you score less than 50 you are probably not convinced that the benefits available are sufficiently substantial, or alternatively, you already have access to a substantial proportion of them.

You should take particular care to choose a supplier who can give you continuing support, both as to hardware and as to software

11 The cost-benefit threshold

(a) Benefits from computer installations are usually related to increased earnings rather than reduced expenditure and are the consequences of

- increased billings, resulting from the introduction of time recording,
- reduced working capital requirement, resulting from speeded billings and improved credit control,
- improved cash flow, resulting from improved credit control,
- improved profitability, resulting from better use of resources.

(b) The following thresholds are suggested for installing a time accounting and management computer system,

- The total installed capital cost of the proposed system should not exceed 30 percent of last year's gross,
- The 30 percent threshold suggested above may be exceeded if the firm's performance, as disclosed by its latest available accounts, is worse than any of the following:
  (i) working capital exceeded 12 months net pre-tax profits,
  (ii) working capital exceeded 6 months gross billing,
  (iii) profit ratio, adjusted for "rent", was lower than 35 percent,
  (iv) the average period for bill payment exceeded 3 months.

12 How do I choose a computer system?

You should select a shortlist of not less than three and not more than four potential suppliers. Other solicitors who have had experience of using computers may be willing to help you compile your shortlist.

The shortlisted suppliers should be invited to propose for your installation according to a detailed invitation setting out your requirements, the size of your firm and volumes of matters, accounts and other relevant aspects which will determine the size of the system you need.

Use of a standard and detailed form of invitation to tender will help you compare the proposals made. It will help to ensure that you obtain answers to the questions you judge relevant to your needs, as well as the information which the proposer believes you should have about his system. The replies by the successful proposer will also stand as written representations before contract which, in the event of the system's failure, may be of value in maintaining a claim for misrepresentation.

You should take particular care to choose a supplier who can give you continuing support, both as to hardware and as to software. Supply of both hardware and software from a single source is not essential, but will avoid contention between separate hardware and software suppliers and the need to diagnose faults as being primarily hardware or software based. You should look for good local engineering support and a four-hour or less call time.

Since your practice is likely to expand and you will probably want to add new uses to your computer, you should choose a supplier who has a clear upgrade path (eg one whose equipment offers successive ranges in size which are capable of receiving and operating the same applications software without any or any substantial amendment). You should also examine each manufacturer's record in creating mutually software-compatible successive generations of computers.

13 Installing the computer

Unless you have used a computer previously, you will need help in establishing a management structure for your new data processing department. Typically, such a department is headed by a data processing manager (accountable to a partner) who has under him a data controller, data preparation staff and one or more operators. In smaller offices, the accountant or cashier performs the function of data processing manager and data controller, and a keyboard operator or typist is trained as machine operator. It is important to have a second standby operator with the necessary skills to cover for holidays and sickness. Management and operating routines are important in computer installations and must be thoroughly learned and effectively practised and monitored.

Having established a management structure, the process of installation must be carefully planned. This should include training courses in computer management, computer operation and systems operation. A structured timetable should be prepared and batches of specimen test accounts should be run through the computer to prove that the software, as delivered, works correctly. Such tests will also prove the competence and confidence of your new data processing department. Basic information (creating client and other computer files) will be prepared on the computer before balances are transferred at a predetermined date and the system goes "live". Monitoring will continue for a limited time thereafter, and adjustments may be necessary. Parallel running should not be necessary with proved software and should be avoided if possible: it places substantial pressures on an accounts department which, in the course of transferring its records to a computer, will be under pressure in any event, and an inadequately monitored parallel run is of little value.

Before attempting the transfer of records to a computer system it is important that the firm's current accounting records should be in proper and up-to-date order and that obsolete material (eg closed accounts) should have been removed.

Hardware delivery should take place at an early stage in the installation programme, and since hardware deliveries are notoriously unreliable the installation programme should be flexibly planned so that it can be fitted round hardware delivery, rather than otherwise. The hardware supplier will

usually perform standard post-delivery checks on the equipment when the machine is installed and before handover, and will usually give a certificate to that effect if asked to do so. The certificate will establish the condition of the equipment on delivery. It is a good idea to reserve a proportion of the contract price until the whole system is up and running.

14 Getting the best out of the computer

If a user-group is available, you should join it. The group will help to co-ordinate users' requests to the supplier. It will also provide a useful forum for debate on the system and its strengths and weaknesses. Stand-by facilities are more easily set up and mutual support in staff training and experience can be arranged with co-operative fellow users.

A successful supplier will wish to maintain the goodwill of his users by providing a support service, usually at an annual fee and sometimes subject to additional charges for specific services. Your line of communication to the support service should be well open and telephone help is usually available. A support service is not a substitute for adequate staff training and, if you find you need more than occasional help, either the system is inadequately developed or your data processing department is not operating efficiently.

Once your system is running smoothly, you should consider planning your next project. If your supplier offers further software packages, consider whether they will be useful to you. If your particular needs are not covered, consider inviting your supplier to develop a package to meet them, or in the alternative consider employing a software house to write a package for you. This latter course is expensive and can be hazardous: using an established package will be safer and cheaper.

Your machine will probably be obsolescent within two years of installation. You should be aware of new developments, from both your supplier and others, so that you can take advantage of them sooner rather than later. You should plan to amortise the cost of your hardware and software over a maximum of five years, and preferably over three years.

15 Coping with faults

Circumstances will vary widely and much will depend on the skill you have exercised in approving and, if necessary, amending your supplier's standard form of contract before you agreed to take his system. Many suppliers are open to negotiation on their contractual forms and this is an area in which solicitors should be well able to look after themselves.

Areas which you should seek to cover in your contract with the supplier include:

- Conditions as to suitability and performance.
- Correct sizing and capability of the system to handle your present volumes of data, and your expected rates of expansion.
- "Response times": a VDU should be capable of displaying data within four seconds of executing a command through the keyboard. Response times are particularly critical in word processing systems.
- Copying procedures, and assurances that they can be undertaken daily within defined timescales which do not cut down your operating schedules.
- Availability and adequacy of hardware engineering support and software support during your expected period of use of the system.
- Suitability of your proposed operating environment.
- An indemnity against third party intellectual property infringement claims.

Assuming that you have taken appropriate protection under your contractual arrangements, practical steps are necessary if your system goes wrong.

- If you do not have a unitary supplier of both hardware and software, be confident that you can distinguish between hardware and software faults.
- Be confident that your staff are competent and properly trained and supervised.
- Keep a log of faults and report each promptly to the supplier.
- If you judge the defect fundamental, look around for an alternative system sooner rather than later and if necessary withdraw to your former system.
- If the supplier has under-specified in order to meet your cost budget, consider negotiating for a free upgrade.

Most hardware suppliers exclude consequential loss and most software houses exclude liability for programme faults. The hazards of computing are such that exclusions are usually insisted upon by suppliers, though some software houses now have "errors and omissions" insurance as a protection against claims by clients and third parties. Typically, software houses are small and have only limited assets: even if you have not had your claim excluded under the terms of your contract with the software house, in the absence of such insurance you are likely to find the resources available to meet a major claim are not substantial. The ability to sue for loss may then be cold comfort.

JAM TOMORROW — *How the information revolution can improve administration and practice of the law.*

16 Information retrieval

Computer-assisted legal information retrieval systems are now in everyday use in some jurisdictions. These systems are based on the central collection of legal materials (usually statutes and law reports) on a single computer installation which subscribers to the service can "search" through terminals installed in their own offices. In some cases, the system is "dedicated" (ie the user rents a terminal from the system proprietor, which terminal is specially designed for the system and can be used only to access that system's information library), or the system may be "networked" (ie can be accessed by means of a general purpose computer terminal through the public telephone network). Because no single system is likely to contain all the materials a lawyer is likely to need, networked systems will in the longer term be more favourable to the user who needs access to a number of information sources. At the moment, dedicated systems are more widely used.

At present, there is a tendency to offer only legal source materials (eg statutes and law reports) on computer-assisted legal information retrieval systems. Many lawyers feel they have a more immediate need for access to secondary materials (eg text books, commentary and journals) as a first step in the process of looking up the law. Offering such materials creates editorial and copyright problems, but they should not be insurmountable. The provision of such secondary materials will in itself aid searching, since authors and commentators organise their work

according to well-recognised headings and patterns and by subject matter in ways with which practising lawyers are familiar. For the future, the provision of secondary materials is seen as of substantial importance to smaller firms who cannot afford a comprehensive and up-to-date text book library, but who nevertheless need (and would be willing to pay for) access to the books they cannot afford to buy.

An alternative means of publishing law books is just around the corner. The laser disc, in appearance like a 12-inch gramophone record and capable of holding the entire contents of the Encyclopaedia Brittanica but costing in physical production terms only a few dollars to manufacture, is now available and offers an alternative method for producing and selling law books or even complete law libraries. The purchaser of such a disc would need a small machine to enable him to read and search its contents, but the cost of such a machine is likely to be less than that of a small word processor and once the machine and disc are acquired the cost of searching is time-independent. The savings in space, time and distribution costs are likely to be supplemented by the ease with which publishers will be enabled to manage their subscriptions lists and updating procedures with this kind of publication.

Books will continue to be the lawyer's basic information tools and the major costs in publishing will remain editorial ones. However, the indications are that electronic publishing will enhance book sales rather than otherwise, while at the same time enabling publishers to "sell" their hard-gained information in alternative forms in response to casual on-line enquiries and in the form of packaged information on laser discs and other compressed storage media.

The National Law Library has been established in the United Kingdom as a professionally controlled charity expressly for the purpose of encouraging and co-ordinating these developments and influencing them so that they will meet the needs of the practising legal professions.

17 Diagnostic and support systems

The medical profession has already developed computer programmes and techniques to help in the diagnosis of complex medical syndromes. The computer lists questions which the clinician answers in the course of his examination of a patient and, according to the answers given, the computer then offers standard diagnostic responses. This method improves control by standardising routine examinations, helps to prevent the accidental omission of a critical point, and supports the inexperienced clinician by drawing on the accumulated experience of consultants and other authorities whose skills have been built into the system's programmes. Similar procedures can be applied to recognisable legal syndromes, with broadly similar advantages.

Diagnostic programmes of this kind are not intended to supplant human skills, but to support them. Except in mathematical or analogue terms, computers cannot exercise judgment or imagination, and a clinician or legal adviser who uses computer support programmes to help him in the analysis of a particular problem will be left fully responsible for these aspects of his work. However, without accurate information about the relevant law and the facts to which it is to be applied, a lawyer's judgment will be at best misplaced. Support programmes are intended to assemble the necessary facts and relevant law in an orderly manner so that the adviser can exercise his judgment properly.

Programmes of this kind have two main functions. First, to ensure that relevant facts are elicited and taken into account; secondly, to analyse responses to given questions and to match known statements of the law to such responses so as to guide the adviser through a complex field. Output from such a system can include a record of the facts and answers elicited in response to questions as an "audit trail" to the advice given, together with extracts from the relevant statutes and cases, practice notes and commentaries on the relevant law, and letters and documents where they are appropriate for use in the transaction in question.

Where such systems are developed, they will enable delegation of work to para-legal and other junior staff at least in the initial fact-finding stage, and in some cases through the complete transaction. The support such systems can give will help quality and professional control, and the systems themselves will save time and reduce cost. The client will get a cheaper, faster and probably better service than if he had waited to see an overworked principal on a trivial but complex problem involving a field of law in which the principal does not regularly work. Widespread use of such systems will reduce the cost of developing them and help to maintain their quality. They will be a further means of spreading expertise across the practising profession and, in commercial terms, of opening up new markets for legal advice by offering services at costs which clients will find acceptable.

18 The need for standards

Both networked and packed information services and diagnostic and support systems will benefit from the development of generally accepted standard formats for services of this kind. Such standards will assist maintenance of quality and improve acceptability by making the media and the equipment on which the services are provided generally interchangeable and by avoiding the need for users to learn a multiplicity of techniques for broadly similar systems. There will be a high discouragement factor if these services are found difficult to use, and discouragement will be compounded if each version of a service has its own learning curve.

Because development of new systems is innovative, expensive and usually undertaken secretly, co-operation between suppliers is difficult to achieve: who will give away the fruits of his own labours to help a competitor destroy the developer's market lead? But if no one will use a variety of over-complex, incompatible and competing systems, all suppliers, the public and lawyers will be the losers.

The professions should take an initiative through Bar associations, law societies and law foundations to promote co-operation and if necessary themselves develop standards which suppliers can adopt. The cost in professional time and in money terms will be substantial and is likely to be wasted if the effort is inadequate. The benefits to the public, the professions and suppliers could however be substantial. The responsibility for taking such initiatives lies with the professions themselves.

19 Towards a Galactic information system

Readers of Isaac Asimov's science fiction works may be forgiven for seeing this suggestion as an imaginary fragment from hyper-space. But information and its organisation and control is one of the burning questions of this quarter century and unless the problems presented by the current prolifera-

tion of information systems now emerging are tackled coherently our new information services, which could be so beneficial to the world community, may be strangled by their own incompatibility and complexity.

Lawyers are not the only section of the community faced with a growth in information systems and the need to co-ordinate them. The scientific disciplines are well advanced in this area, and lawyers should co-operate with scientists and others who have already established networks and protocols to assist in the transnational flow of information. The international telecommunications community is an important one, and apparently neglected by the legal professions' governing bodies.

By the consequent improvement of access to the law through cheaper, better and faster legal services, the Rule of Law will be strengthened

Standards can be frustrating as well as liberating. The aims should be awareness of the world's progress, and compatibility with non-legal systems where it can readily and appropriately be achieved. Where such compatibility is not readily achievable at acceptable cost in time, money and limitation, the international legal community should attempt independent progress on standards which can be useful to lawyers and their clients.

20 Law administration and enforcement

There is scope for improved administration in the Courts in the listing of cases, calling of witnesses, funds administration and control of documents, as has been proved in a number of Magistrates Courts in England and Wales where computer systems have been successfully installed. Introduction of computerised procedures in the High Court will take time, not least because some of the people who work in these superior Courts are not enthusiasts for technological innovation.

There may be scope for collating experience in the assessment of awards for damages for personal injuries and in making the resulting product available to litigants and to Judges. There may also be scope for collating experience in sentencing in the same way. Care must be taken not to abdicate responsibility for such assessments to machines or systems which are not capable of exercising human judgment.

21 Socio-economic consequences

(a) Disadvantages:

(i) The cost and time required for developing these systems will vary widely according to their complexities. Consistently, data processing professionals underestimate the time and cost required to complete known systems analysis and programming tasks. In an area where lawyers and data processing professionals must work together, the scope for misunderstanding and mis-assessment is increased. Even apparently simple systems are likely to take longer and cost more than responsible prior assessment estimates, and adequate funds must be made available if successful products ae to be created. Inadequate funding is likely to lead to unreliable products and consequent loss of confidence.

(ii) It is likely that errors will be made and will become embedded in accepted systems, so that the later detection and removal of such errors will be difficult. One serious error can lose credibility for a whole system, or even for the principle of using computers.

(iii) At some stage, complexity and rigidity of systems inhibit creativity and human adaptability. This risk is inherent in any attempt to systematise procedures which are required to meet changing or variable circumstances. Recognition of the risk must be accompanied by imaginative design to minimise it and willingness to change, and if necessary abandon, systems which are found to be inhibiting.

(b) Advantages:

(i) Successful systems will improve consistency, quality and control of the work they support.

(ii) Costs will be reduced and new markets and services will be developed.

(iii) By all these means and by the consequent improvement of access to the law through cheaper, better and faster legal services, the Rule of Law will be strengthened.

The following brief summary of the comments made when Mr Chalton presented his paper is reproduced from the Triennial Conference Committee's "Conference Brief":

J G Grieve, Invercargill, said Mr Chalton's paper would "become a standard reference for New Zealand lawyers".

He suggested that smaller firms could profitably gain experience by renting the expertise and equipment of a local computer bureau.

Programmes have been developed specifically for New Zealand conditions for example for client billing and time recording. He noted that in his experience of word processors over a period of five years typing staff had been reduced slightly, for two-and-a-half times more output, with subtantial reductions in author time.

J K Guthrie, Dunedin, stressed the need for a planned approach to acquiring computer equipment. A typical plan would be to:

1 Carry out a feasibility survey of the work to be automated;
2 Look at progress in similar firms in New Zealand;
3 Take proposals to suppliers;
4 Chart goals for implementing the system.

Mr Chalton pointed out that smaller, more flexible, firms (up to five partners), often get the greatest benefit from computer systems. He suggested that an "in-house" computer should be within the reach of all but the very smallest firm.

He agreed that it can be hard to decide when to tackle using a computer. Machine costs are falling by about 15 percent per annum and the machines become more sophisticated. Obsolescence within five years is normal, and one should aim at writing off equipment over three years. But in the year you start a time recording system, you can expect increases in gross billings of more than 30 percent.

P F Clapshaw, Auckland, said the difficulties in implementing computer systems are often very human ones. The psychological effects of coping with change should not be underestimated. It requires much self-discipline for staff to change lifelong habits.

There are fears that smaller firms may fall behind because of lack of access to the up-to-date material held in such systems.

Credit Contracts

Tony Black

THE Credit Contracts seminar conducted by Messrs C I Patterson and R P Darvell in Wellington was an extremely valuable introduction or, for those who had read *The Credit Contracts Act* by D F Dugdale, follow-up to this new Act. In particular a number of problem areas were identified and the purpose of the first part of this note is to list some of them with a view to continuing in these pages the discussion on how best they may be resolved. In the second part more detailed consideration is given to the concept of Revolving Credit Contracts.

In speaking of the definition of a credit contract, Paul Darvell described it as involving in essence:

(a) a concept of time and
(b) the concept of a charge for time — of a greater amount of money coming back at the end of a period of time than that advanced at the beginning.

If those features exist, then it would be wise to assume the Act applies — and indeed those concepts prove very useful when seeking to determine the scope of various provisions in the Act.

The following points were underlined:

(a) the all embracing nature of the Act (for example it was suggested from the floor that it may affect the compromise of an action);
(b) the need for the exercise of professional judgment if clients are to be steered away from the accusation of oppression or consequence of non-disclosure. It is a case of caveat creditor.
(c) The desirability of sticking to the tried, true and simple track. Departures, especially where the finance rate is affected, invite trouble.
(d) The avoidance of front-end fees (procuration fees etc).

Included among the problem areas were delays in settlement that alter the finance rate, whether various types of insurance premium required to be made by a mortgagor (fire, replacement, mortgage guarantee, life) fall within the definition of total cost of credit, and difficulties attending deciding whether a transaction is or is not a revolving credit contract. Doubtless there are others and from discussions with practitoners since the seminar it is very apparent that the debate continues.

The following notes, dealing with mortgagor's convenants and revolving credit contracts, are put up as Aunt Sally's in the hope that even if (when?) knocked down they will at least be of some help in developing a co-ordinated approach.

It is a case of creditor emptor

Mortgagor's covenants

Mortgagor's covenants of the type set out in the Fourth Schedule to the Property Law Act 1952 fall into two classes:

(a) Covenants requiring the mortgagee to pay something — insurance premiums and rates being the most common.
(b) Covenants requiring the mortgagor to do something — such as keep buildings in repair in default of which the mortgagee may, but is not obliged to, remedy the default, moneys expended being repayable on demand and until payment carrying interest.

If any of these payments, or contingent payments, fall within the definition of cost of credit in s 5 and are not exempt under s 3(3)(b) they will not only require disclosure but also complicate most horribly the calculation of the finance rate.

The following terse notes summarise the main impressions from speaking to others, with a few other random thoughts indiscriminately mingled:

(i) *Payment by mortgagee to remedy repair default*

The contingent liability of the mortgagor will form part of the total cost of credit (money the mortgagor "may become liable to pay") but would be exempt under s 3(3)(b)(ii) as long as it is a reasonable amount payable on default.

(ii) *Rates*

Clearly rates are exempt under s 3(3)(b)(vi) as an amount required to be paid under any enactment. Note that the subparagraph does not stipulate by whom the amount must be paid. Thus it should make no difference whether or not the mortgagee is the occupier (and therefore the person primarily liable to pay rates — Rating Act 1967, s 62).

(iii) *Fire insurance premium*

What is an incidental service within the meaning of s 3(3)(b)(i)? Dugdale (p 26) is of the opinion that "insurance premiums, if reasonable, and if the lender is the insurer, are incidental services . . .". He goes on to "quaere whether that subparagraph extends to incidental services which it is not intended that the creditor should supply." There seems to be no reason to so limit the ambit of that subparagraph for (as with s 3(3)(b)(vi) and rates) it does not specify by whom the incidental services must be provided. It is also worth noting that the report of the Contracts and Commercial Law Reform Committee was less happy about directed insurance than freely chosen insurance (pp 147-149).

(iv) *Replacement insurance — a grey area*

No one yet is prepared to hazard a firm opinion.

(v) *Mortgage repayment guarantee insurance*

Generally felt to be part of the cost of credit.

(vi) *Life insurance premium*

Again felt to be part of the cost of credit. This opinion is consistent with the recommendation in the Report. However, there is an argument that where the life policy is collateral security the payment of the premium may be regarded as an incidental service

to the property, ie, the life insurance service to the property, ie, the life insurance policy, over which security is taken and therefore exempt under s 3(3)(b)(i).

Revolving credit contracts

Three definitions (in ss 2, 3 and 15) are relevant and are set out in skeleton form to emphasis their main points:

"credit contract" means —

> A *contract* under which a person agrees to provide money. . .

"controlled credit contract" means —

> A *credit contract* . . . where the creditor is a financier. . .

"revolving credit contract" means —

> A controlled credit *contract* where it is *contemplated* at the time *the contract* is entered into that credit *will* be provided under *the contract* from time to time. . .

The word "contemplated" is the stumbling block, there being a fear that any expectation, no matter how vague, that further moneys might be advanced under the security given (for example, a mortgage or debenture securing "further advances") would suffice to bring the transaction within the definition of revolving credit contract and so attract the rather onerous disclosure requirements of the Act.

While allowing a definition that is wide enough to embrace that interpretation, the *Oxford Dictionary (Concise* and *Shorter)* by no means compels it. It also defines "contemplate" in terms of what is expected, intended or purposed. This moves the emphasis from what could happen towards something that is likely or expected to happen.

In interpreting "contemplation" in the context of the Act the following approach might commend itself:

(1) Who must do the contemplating? The commonsense answer is that both parties must contemplate that further credit will be provided. It would be unreal for a financier to be bound by the unilateral subjective expectation of a borrower.

(2) What evidences this contemplation? In *Scene Estate Ltd v Amos* [1957] 2 All ER 325 (CA) the question arose as to whether, in the case of successive agreements for three months' grazing rights extending over several years, it could be said that it was "in contemplation" that the land would be used "only for grazing during some specified period of the year". The Court of Appeal did not feel entitled to look beyond the documents except for the purpose of showing the agreement to be a complete sham. Thus, the Court did not see any need to depart from its usual objective approach to the interpretation of contracts or from the general rules relating to the admissibility of extrinsic evidence (see Hals 4 ed Vol 9 para 287: Cheshire & Fifoot 5 NZ ed p 104) except in the case where the agreement was a sham and ran contrary to statutory requirements. (It should also be remembered, though, that extrinsic evidence is admissible to show that the written terms did not express the whole agreement). The advantage of adopting this approach is that it gives a measure of certainty to written agreements by placing a heavy onus of proof on the party seeking to go outside or beyond them.

(3) What then is it that is "contemplated"? When security is given and the parties, looking to further credit arrangements but agreeing nothing, expect that security to extend to any future arrangement, is it then contemplated that "credit will be provided"? Or is the credit which is contemplated only that credit to be made available under an existing contractual arrangement?

A cautious approach, which is easy to decry by those not responsible for advising financiers, will assume the worst — namely, that the first situation falls within the definition of revolving credit contract. The following matters may be seen as supporting the proposition that it is not within the definition and that it is only credit to be provided under an existing contractual arrangement that is:

First, (and this is not evidence likely to impress a Court but it marks a beginning) in the Report of the Contracts and Commercial Law Reform Committee, on which the Act is based, contracts of this type are described as "contracts which enable the debtor to call on a financier's resources *within a specified limit*" (Chap IX para 9.02). They are also described as cases where "the financier extends to the debtor a facility under which the debtor may borrow money or purchase goods on credit *up to an agreed ceiling*".

By way of contrast, the report treats "a contract in which the amount is fixed but which contemplates the possibility of further advances as a closed-end transaction" — ie, not as a revolving credit contract. This gives some indication of what it is the Act seeks to control.

Secondly, the Act, according to its long title, is concerned with contracts, and with protecting debtors before they are irrevocably committed. If a debtor is not committed he has no need for the protection of the Act.

Thirdly, in the progression of definitions set out above — credit contract — controlled credit contract — revolving credit contract — there is such a reiteration of the word *contract* that it is difficult to believe anything less is intended.

Fourthly, note carefully the definition of "revolving credit contract" itself. It refers to something "contemplated at the time *the contract* has been entered into". That something is that "credit will be provided under *the contract*". The words "the contract" it is suggested refer back to those same words earlier in the definition.

It is also contemplated that "credit *will* be provided" — the use of "will" suggesting some obligation on the part of the creditor. In cases where the arrangement imposes conditions on future advances it will be a matter of construction whether those conditions introduce such a degree of one-sided flexibility that there is no more than an agreement to agree. This flexible type of arrangement invites problems.

(4) When preparing documentation two drafting steps were suggested at the seminar:

First — avoid the term "further advances" in security documents and use an alternative such as "moneys from time to time outstanding". This removes the future contemplation element from the documents.

Secondly — separate the security documents from the credit documents. The words "the contract" would, or so it could be argued, then refer to the credit contract portion only.

These are counsels of caution and will do no harm.

But the approach suggested above renders them unnecessary and it may be better in the long term to adopt a positive approach to what the Act *is* about than to seek through drafting techniques to avoid what it *may* be about — this, of course, being easy to say when it is someone else's money!

Erebus — jurisdiction and natural justice

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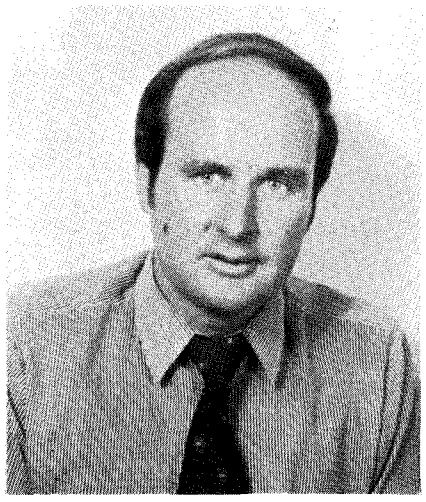

THE judgments of the Court of Appeal in *Air New Zealand & Others v Mahon & Others*, delivered on 22 December 1981, in which certain findings of misconduct contained in the now controversial report of the Royal Commissioner, The Hon Mr Justice Mahon, into the "Erebus" air disaster were considered, are important for administrative and constitutional lawyers in a number of respects. The Commissioner reported to the Governor-General on 16 April 1981. His Report is published in the Appendices to the Journals of the House of Representatives.

It is not proposed to comment here on the Court of Appeal's rulings in relation to individual complaints or make any reference to issues involving evidence. This would be impossible without a full and detailed consideration of the evidence placed before the Commission. Rather, this comment is principally concerned with the Court's unanimous ruling that the Commissioner's finding of criminal misconduct in para 377 of his Report, in which he found that the airline had engaged in a "predetermined plan of deception" and conducted an "orchestrated litany of lies", was beyond his jurisdiction and made contrary to natural justice. Apart from this ruling, however, there are certain other issues which also merit some consideration.

The Court delivered two judgments. Woodhouse P delivered a judgment which also embodied the opinion of McMullin J. A further joint judgment was delivered by Cooke J, Richardson J and Somers J. Although the two judgments reflect some judicial division in so far as the extent of the Court's power to review is concerned, on the issues of jurisdiction and natural justice the Judges were entirely in agreement.

In principle, their Honours had little difficulty in asserting their power at common law to exercise supervisory jurisdiction over Commissioners of Inquiry or Royal Commissioners, appointed as they are in practice in this country pursuant to the Commissions of Inquiry Act 1908. Justification given by the President was that "while Commissions of mere inquiry and report are largely free from judicial control, there is a strong authority indicating that Courts have at least a duty to see that they keep within their terms of reference." In support, the judgments refer to the opinion of Myers CJ in *Re Royal Commission on Licensing* [1945] NZLR 665, at 667-670.

The Court also asserted that the remedy of review given by ss 3-4 of the Judicature Amendment Act 1972 as further amended in 1977 was available. The judgments, however, indicate a difference of opinion on the issue of whether the Commissioner's findings as embodied in his Report could satisfy the definition of a "statutory power of decision." Woodhouse P and McMullin J considered that the definition of "statutory power of decision" as amended in 1977 to include "statutory investigations, and inquiries into the rights . . . or liabilities of any person" encompassed the report of a Royal Commissioner, and justified review. In their opinion, the purpose of the Amendment was "manifestly to make the ambit of review under the Act at least as wide as at common law". The other members of the Court, however, adopted a more conservative approach and justified review under the Act on the basis that the order for $150,000 costs, made by the Commissioner against Air New Zealand was a "statutory power of decision".

The Court also appeared divided on the issue of whether review was unavailable because the Commissioner had presented his Report to the Governor-General and hence, it was argued, was "functus officio". In this regard, *Reynolds v The Attorney-General* (1909) 29 NZLR 24 was cited to the Court. Woodhouse P and McMullin J felt able to avoid the difficulties inherent in the "functus officio" argument in so far as the scope of the writ of certiorari was concerned because, in their opinion, there was no difficulty in granting a remedy of declaration for "jurisdictional errors and closely analogous defects such as unfairness and breach of natural justice". Because the remedy of declaration would have been available, s 4(2) of the Judicature Amendment Act 1972 was satisfied, and the Court had the power to review pursuant to the statute. On the issue of declaration and jurisdictional errors or natural justice, their Honours referred to *De Verteuil v Knaggs* [1918] AC 557; *Pyx Granite Co Ltd v Ministry of Housing* [1960] AC 260 and *Ridge v Baldwin* [1964] AC 40. Further in this regard, Woodhouse P and McMullin J considered that a statement in the case of *Reynolds v The Attorney-General* (supra) was obsolete in so far as it suggested that a declaration was unavailable in the case of a body or officer no longer in existence. Although the other members of the Court, Cooke J, Richardson J and Somers J, agreed that "the power of the Courts to grant declarations . . . is wider than was thought", these Judges, again more conservatively, disposed of the "functus officio" argument because the Report contained an order for costs against Air New Zealand. Since this order could not be severed from the Report itself and since, as all the members of the Court agreed, it was made pursuant to an incorrect exercise

of the discretion contained in s 11 of the Commissions of Inquiry Act 1908, or was in excess of the amount conferred by the appropriate scale (1904 *Gazette* 491), the Court had jurisdiction to intervene.

Closely related to this issue, however, was a further division of opinion as to the Court's power to review particular passages in the Report of a Commissioner. The Court did not have to finally determine this matter however, because the Judges were unanimous that merely quashing the order for costs in the circumstances would be sufficient to achieve justice, and appease damaged reputations. Woodhouse P and McMullin J, however, considered that, had it been necessary to go beyond the formal order made, they would have been prepared to do so. The other members of the Court, preferred not to determine this issue since in their opinion it was unnecessary to do so.

With respect, it is submitted that the approach foreshadowed by Woodhouse P and McMullin J is to be welcomed. Given that Royal Commissions or Commissions of Inquiry often, as the present case illustrates, carry such serious consequences for individuals' reputations, then technicalities (such as whether the Commissioner is functus officio or whether his role is simply to inquire and report) which may have circumscribed review in the past should not, it is submitted, preclude the Courts today from granting such relief by way of declaration or statutory review as is appropriate in the interests of justice. It must also be emphasised that, although leaving this issue undecided, Cooke J, Richardson J and Somers J also appeared to suggest that a Commissioner's report might, in "a sufficiently clear-cut case" be the subject of review.

As a corollary to the Court's unanimous emphasis and concern for the individual and his reputation, the Court held that the Commissioner was bound to observe the principles of natural justice. The Judges, it is submitted, were rightly unimpressed with arguments that their jurisdiction was only to inquire and report, an argument which appealed to a majority of the High Court of Australia in *Testro Bros v Tate* (1963) 109 CLR 353. Since that decision, Courts in England and in this country have placed far greater emphasis on the observance of natural justice where rights, expectations or reputations are in jeopardy. See *Ridge v Baldwin* [1964] AC 40; Wade, *Administrative Law* 4th ed pp 442-447; in *Re Pergamon Press* [1971] Ch 388; *Bushell v The Secretary of State for the Environment* [1973] WLR 22; *Fairmount Investments Ltd v Secretary of State for the Environment* [1976] 2 All ER 865; *Daganayasi v The Minister of Immigration* [1980] 2 NZLR 130, 141-145; and further see *Re Royal Commission on the Thomas Case* [1980] 1 NZLR 603, 614-615. Woodhouse P and McMullin J cited in support the opinion of Megarry J in *John v Rees* [1970] 1 Ch 345, 402: "everybody who has anything to do with the law well knows the path of the law is strewn with examples of open and shut cases which somehow were not; of unanswerable charges which in the event were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change". Cooke J, Richardson J, and Somers J emphasised additionally that Parliament in 1958 and in 1980 had amended the Commissions of Inquiry Act 1908 to enable an aggrieved person whose interests might be adversely affected by evidence given at the Commission to appear personally or by counsel before it. (Section 3: 1958; Section 4: 1980).

In so far as the principles of natural justice were concerned, the Court felt it unnecessary to answer a further submission based on what would appear to be an apparently developing limb of natural justice to the effect that there was no evidence to support the Commissioner's findings of conspiracy (see for discussion of this concept, Wade, *Administrative Law* 4th ed, pp 277-278). What has, however, stimulated some controversy is the Court's unanimous ruling that the Commissioner omitted to observe the audi alteram partem rule prior to making his strong condemnation of the airline and its presentation of evidence. In so ruling, it might appear that the Court had gone further than the decided cases and extended the scope of the rule into the realm of credibility. However, the Court did not rule that in every case where witnesses were discredited it was necessary to observe natural justice. Rather, it would appear to be a question of degree. Although the criticism complained of here pertained to credit, it further suggested, as Cooke J, Richardson J, and Somers J perceived, conduct on the part of certain unnamed officers of the airline, which was "sinister". Given the modern judiciary's solicitude for reputations and natural justice, it is submitted that it is not perhaps surprising that the Court should have insisted on natural justice in these circumstances, assuming that the Commissioner had the jurisdiction to make the allegations of conspiracy — a question which the Court, in any event, answered unanimously in the negative.

In ruling that the Commissioner had no jurisdiction to make the allegations contained in para 377 of the Report relating to "the predetermined plan of deception" and "orchestrated litany of lies", both judgments refer to the important decision of the Court of Appeal in *Cock v Attorney-General* (1909) 28 NZLR 405. In that case the Court of Appeal prohibited a Commissioner appointed under the Commissions of Inquiry Act 1908 from investigating an issue of alleged bribery concerning members of a Licensing Committee. The Court held that it was unconstitutional for a Commission to be created to investigate a crime. See D R Mummery, "Due Process and Inquisitions" (1981) 97 LQR 287; cf *Clough v Leahy* [1904] 2 CLR 139; *McGuinness v Attorney-General* [1940] ALR 110; further, *Re Sedlmayr* (1978) 82 DLR (3d) 161; *Re Anderson* (1978) 82 DLR (3d) 706. The Court, aware that review proceedings relating to the Royal Commission into the investigation of the conviction of Mr A A Thomas was shortly to come before it, declined to reconsider the ratio decidendi of *Cock v Attorney-General*. However, the decision was referred to in both judgments for the proposition, advanced obiter by Williams J, to the effect that a Commissioner of Inquiry might investigate and answer an issue involving criminal misconduct when "it was merely incidental to a legitimate inquiry and necessary for the purpose of that inquiry", (supra, pp 424-425). Their Honours unanimously considered that in para 377 the Commissioner had reported in terms which were not "reasonably incidental to his legitimate function of inquiry into the causes and circumstances of the crash".

This ruling may be seen by some as a restriction on a Commissioner's right to comment on issues involving credibility. However, members of the Court appeared to recognise unanimously that comment on credibility might in some circumstances suggest perjury. In the opinion of Cooke J, Richardson J and Somers J what was acceptable was "a question of degree".

Woodhouse P and McMullin J considered that a Commissioner must attempt "to be most circumspect in handling issues of this kind, particularly if misconduct seems apparent which is not immediately associated with the central issues in the case". In their opinion, the Commissioner's findings were "collateral assessments of conduct made outside of and were not needed to answer any part of the terms of reference".

With respect, it may be argued that not only does a Commissioner, confronted by what he considers to be a deliberate attempt to concoct a case, have the jurisdiction to comment strongly even if in doing so he suggests criminal misconduct; but that he has also, in the public interest, a duty to comment on it. In this regard, it is perhaps appropriate to cite the opinion of Lord Denning MR in *Re Pergamon Press* [1971] Ch 388, 400, who, when rejecting a submission that inspectors appointed by the Board of Trade to investigate the affairs of the Pergamon Press should, whenever "deciding a conflict of evidence" or making "adverse criticism of someone", place the proposed draft before the party for comment, said:

> They must be masters of their own procedure. They should be subject to no rules save this: they must be fair. This being done, they should make their report with courage and frankness, keeping nothing back. The public demands it. They need have no fear because their report. . . is protected by absolute privilege.

Further, as the judgments recognise, judicial officers often have the unfortunate task of having to strongly discredit evidence even if in doing so perjury may be suggested. For example, in *Re Craig* [1971] 1 Ch 95, a case concerning undue influence, the defendant was described as giving answers which were "fencing, prevaricating, misleading, quite unacceptable". Given that such strong comment is acceptable, then it is difficult to see why a Commissioner, who is confronted with a number of witnesses who appear to have conspired to tell a false tale should not say so, provided that, before doing so, he complies with natural justice. In this regard it is also submitted that it is questionable whether *Cock v Attorney-General* (1909) 28 NZLR 405, 424-425, affords any authority for the Court of Appeal's ruling in the present case. It is submitted that Williams J in his obiter dictum was referring to criminal misconduct arising antecedent to an inquiry, and was not referring to criminal misconduct connected with the presentation of evidence before the Commission.

In conclusion, therefore, it may be argued that, apart from any issue involving natural justice or lack of evidence, the Royal Commissioner, The Hon Mr Justice Mahon, had the jurisdiction to comment strongly on the manner of presentation of evidence before him, even if this incidentally suggested serious misconduct on the part of parties or witnesses before the Commission. Indeed, there are some who would say that he had a duty in the public interest,in the words of Lord Denning MR in *Re Pergamon Press* [1971] Ch 388, 400, " to keep nothing back".

Options in leases — Relief under section 120 of the Property Law Act 1952

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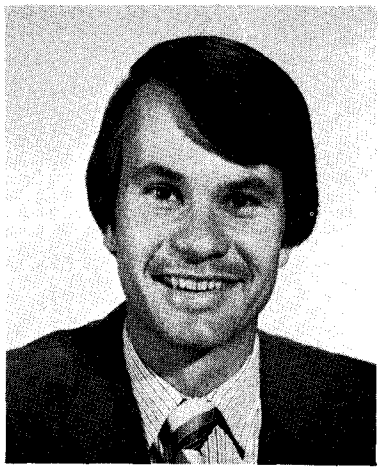


In this article the author discusses the scope of the relief available to a lessee whose lessor rejects the exercise of the lessee's option to renew the lease or purchase the freehold reversion.

IN these days of rampant inflation lessors tend to look more closely at their obligations under options to renew leases or to sell the freehold reversion at a fixed price. Few vendors enjoy parting with land at something less than market value as recent decisions under s 120 of the Property Law Act 1952 testify. Section 120 empowers the High Court in New Zealand to relieve against the lessor's refusal to grant a renewal or to comply with an option to purchase in a lease on the ground of the lessee's breach of covenant.

1 History

The idea that Courts might relieve against forfeiture even when the applicant was in breach made a brief appearance in the common law Courts in the fourteenth century,[1] but the modern doctrine originated in the Court of Chancery along with the equity of redemption during the reign of James I.[2] Section 120 of the Property Law Act 1952 is a distinctively New Zealand[3] appendage to this branch of equity jurisprudence, and probably owes its existence to the early days of the colony when the now familiar long-term agreement for sale and purchase and lease with right to purchase developed as a common form of land alienation. As Williams J said, speaking in 1901:[4]

> My experience extends back all but forty years. What struck me on my first arrival in the colony was that when land was let on lease the lease nearly always contained a clause somewhat similar to the clause in the present case, giving the lessee the right to purchase the freehold. Such a lease would be called indifferently "a lease with a purchasing clause", "a lease with a right of purchase", or "a lease with a right to purchase". In the early sixties in Canterbury a lease without the right to purchase the freehold was not often met with.

Statutory power to relieve upon failure to comply with conditions precedent in rights of purchase, including options in leases (*Nash v Preece* (1901) 20 NZLR 141, 3 GLR 439, CA), was originally enacted in New Zealand by s 25 of the Supreme Court Act 1882 and subsequently s 94(6) of the Property Law Act 1908. Options to renew were not specifically included within s 94(6) but the Court of Appeal in *Parker v Greville* (1909) 28 NZLR 461, CA, applied the general jurisdiction to relieve against forfeitures in leases conferred by s 94(1). This decision was overturned[5] by the Privy Council in *Greville v Parker* [1910] AC 335 NZPCC 262, PC. Authority to grant relief upon the exercise of options for renewal was reinstated by s 3 of the Property Law Amendment Act 1928. Section 120 now empowers the High Court to grant relief in respect both of rights to renew and of options to purchase in leases.

That the legislation enacted in 1952 has not been free of difficulty is shown by the decision of the Court of Appeal in *Vince Bevan Ltd v Findgard Nominees Ltd* [1973] 2 NZLR 290, CA, and recent amendments. The Court of Appeal held that jurisdiction arose only (Turner P dissenting) where the lessor's refusal is based on breach of an actual term of the lease (and not merely on failure to exercise the option in time) and (unanimously) the lessee had not only conveyed his refusal, but a sufficiently clear indication of the grounds of his refusal, to the lessor. The result was that the intelligent lessor needed only to keep silent as to his reasons for refusal and, until the grounds were elicited from him in the course of an action for specific performance, relief could not be granted. The first legislative attempt to restore the position was short-lived — the amendment enacted by s 11 of the Property Law Amendment Act 1975 created more problems than it solved. It was rapidly repealed and now s 120(3)(b) of the Property Law Act 1952, as inserted by s 3 of the Property Law Amendment Act 1976, simply provides that the Court has jurisdiction if the lessee is in breach of covenant, condition or agreement or has failed to give notice of election within time.

The advantages inherent in s 120 are clear-cut. If s 120 did not exist, the usual rule would become applicable: that is, specific performance will not be granted of an option unless there has been compliance with all conditions. Options are invariably subject to compliance with the lease and one actionable breach of covenant on foot at time of exercise, however trivial, otherwise operates as a bar to enforcement of the option.[6] That is the law in England now, (*West Country Cleaners (Falmouth) Ltd v Saly* [1966] 1 WLR 1485; [1966] 3 All ER 210, CA), and, if s 120 is not available, perhaps for non-compliance with time limits, was in May 1981 affirmed to be the current position in New Zealand, (*Swift New Zealand Company Limted v Owen* unreported, Auckland, 8 May 1981, Prichard J, A777/80).

2 Jurisdiction

Three fundamental requirements must be fulfilled before a Court has jurisdiction to grant relief under s 120(4) of the Property Law Act 1952.[7] There must exist:

(a) A lease[8] requiring the lessor either:
  (i) to grant a renewal of the lease or a new lease of the demised premises, or
  (ii) to "assure to the lessee the lessor's reversion expectant on the lease" ie transfer the reversion
(b) A breach by the lessee of any covenant condition or agreement in the lease or his failure to give his notice of exercise of the option within time.[9]
(c) A refusal by the lessor to grant the renewal or assure the reversion.[10]

An option to purchase obviously comes within s 120,[11] but a right of pre-emption or right of "first refusal", where the lessor has not indicated he will re-lease or sell, does not, (*Scott v Skinner* [1947] NZLR 528). Nor does it seem a sub-lessee can obtain relief upon forfeiture of his head lease, (*Cannon Enterprises Ltd v Ranchhod* [1975] 2 NZLR 57, CA). Section 120 applies notwithstanding any stipulation to the contrary and notwithstanding the expiry of the term of the lease.[12]

Jurisdiction under s 120 only arises when the lessee is in breach of the conditions or covenants in the lease. When no breach has occurred the proper procedure is an action for specific performance.[13] Often the lessee will wish to deny the breach for the purposes of the action for specific performance, because to admit the breach would operate as a bar against him,[14] but at the same time bring the application under s 120 to preserve his position should a breach be proved. As the limitation period under s 121 is three months he will normally wish to institute both sets of proceedings simultaneously. But if he does this, does the secondary application under s 120 admit the breach for the purpose of the action for specific performance? In the recent decision of *Besseling & Bracegirdle Restaurants Ltd v Bali Restaurant Ltd*, as yet unreported, Hardie Boys J answered the question in the negative pointing out that it is proper to seek both remedies in the alternative in the same set of proceedings.[15] This raises in turn a second question — how does the onus fall in both sets of proceedings when in the action for specific performance the lessee will wish to deny the breach whereas in the application under s 120, particularly in light of the 1976 amendment, he must prove the breach to establish the jurisdiction of the Court? The onus is diametrically opposed in both sets of proceedings. In *Besseling & Bracegirdle Restaurants Ltd v Bali Restaurant Ltd* Hardie Boys J ruled (p 20) as follows:

> The lessee set out to satisfy me that it had not been in breach. That has been its attitude throughout and that is the way in which I have approached my evaluation of the evidence. If I was satisfied on the balance of probabilities that the lessee was not in breach, then I would have to consider where that left matters. If I were not satisfied, then it would follow that I would have jurisdiction under s 120. A less curious, but also less complete way of expressing the position as I see it, is that there is no onus on the lessor to prove that the lessee was in breach. It is with these guidelines in mind that I now turn to the allegations of breach of covenant.

In other words His Honour was prepared to approach the evidence on the basis that he would consider the action for specific performance first, appreciating that the lessee denied the breach, then, if he found the breach proven, consider the application under s 120 relying upon the breach to establish jurisdiction.

3 Time limits

Section 121(1) of the Property Law Act 1952 provides that an application for relief under s 120 may be made within three months after "the refusal of the lessor to grant a renewal of the lease or to grant a new lease or to assure the reversion, as the case may be, has been first communicated to the lessee." Section 121(2) reads:

> For the purposes of the last preceding subsection, communication to the lessee of notice in writing of the lessor's intention to refuse at the appropriate time to grant a renewal of a lease or to grant a new lease or to assure the reversion shall be deemed to be equivalent to communication of his refusal to grant the renewal or new lease or to assure the reversion, and in any case where notice of intention is so given the period of limitation fixed by the subsection shall begin to run from the date of the communication of the notice accordingly.

The Court of Appeal in *Vince Bevan Ltd v Findgard Nominees* held[16] that s 121(1) operated as a limitation provision and that no application might be entertained three months after communication of a refusal. There is no power to extend time beyond the period. What amounts to sufficient communication to bring the limitation period into play? Some guidance is now available from the recent decision of the Court of Appeal in *Henderson v Ross* [1981] 1 NZLR 417 CA. The lessor had maintained during protracted litigation, which he had manfully carried to the Privy Council (*Ross v Henderson* [1979] AC 196; [1977] 2 NZLR 458 PC) that the option to purchase was invalid for failure to comply with the provisions of the Land Settlement Promotion and Land Acquisition Act 1952. Having failed in the Privy Council he then refused to transfer the property pursuant to the option. The lessee issued proceedings for specific performance or, if the Court held the option not to have been validly exercised, relief under s 120. One question which arose in the second action was the point at which the limitation period commenced running and, in particular, whether earlier correspondence relating to the validity of the option amounted to sufficient communication for the purposes of s 121. One letter sent approximately two years prior to expiry contained these words "We are instructed by Mr Ross to advise you that he is not prepared to proceed with the Option ...." At first instance Quilliam J held that the correspondence read as a whole meant nothing more than that the lessor did not regard the option as valid and as such did not set the limitation period in motion ([1979] 2 NZLR 284). In the latest Court of Appeal action the lessor failed for the second time. The only Judge who considered the communication point was Cooke J who said (at p 425) "... the test must be whether a refusal has been communicated with sufficient clarity to cause a reasonable person in the shoes of the lessee and aware of his statutory rights to understand that the period of three months in which he can apply for relief has begun to run." He pointed out that ultimately the question is one of fact.

Despite its wide wording, the would-be purchaser who is out of time receives little solace from s 50 of the Property Law Act 1952. Section 50 provides that a purchaser under "any right or option to purchase any land" may apply for relief under s 118, and on its face looks applicable to options in leases. Unfortunately there is a long line of authority holding that s 121 operates as a limitation provision, so that if an applicant is out of time he may not obtain relief by the back door under ss 50 and 118.[17] This leads to the curious result that options to purchase or renew in leases are subject to the three months limitation period whereas other options and agreements for sale and purchase,[18] where the purchaser has taken possession, are not.

4 The discretion

Assuming the application under s 120 has not been rejected in limine, the Court must resolve whether to exercise its discretion in the applicant's favour. The question then becomes not whether the Court can grant relief, but whether it will do so in the particular circumstances before it.

Power to grant relief is contained in s 120(4) of the Property Law Act 1952 which reads:

> (4) The Court, having regard to all the circumstances of the case, may grant or refuse relief as it thinks fit, and in particular may decree, order, or adjudge —
>
> (a) That the lessor shall grant to the lessee a renewal of his lease or a new lease, as the case may require; or
>
> (b) That the lessor's covenant or agreement to assure the reversion ought to be specifically performed and carried into execution, and that the lessor shall execute such assurances as the Court thinks proper for that purpose, —
>
> on the same terms and conditions in all respects as if all the covenants, conditions, and agreements aforesaid had been duly performed and fulfilled.

The effect of s 120(4) is aptly set out in *Re a Lease Kennedy to Kennedy* [1935] NZLR 564 at 567; [1935] GLR 539 at 541, where Reed J said:

> The provision gives the Court the fullest discretion, and, as I read it, the intention of the Legislature is that the Court regardless of technicalities, should endeavour to do what may be colloquially expressed as "a fair thing between man and man". An order such as is sought, if granted, is taking away from the lessor a right to which, by virtue of the contract between the parties, he is entitled.

As was pointed out by Turner P in *Vince Bevan Ltd v Findgard Nominees Ltd*, p 297, s 120 was enacted as "a remedial measure" and should be interpreted as conferring "a very wide jurisdiction to do equity in relieving against refusal by lessors to renew leases". In the same decision McCarthy J said (p 299) ". . . I agree we should not view these sections narrowly, neither in the jurisdiction conferred nor in relief to be granted. The obvious final intention of the Legislature was to place the Court in a position to do what it thinks fit in accordance with the justice of the particular application."

A case which illustrates the wide power resting in the Courts to do justice between one person and another is *Carter v Te Aotonga Rangiheuea* [1957] NZLR 1184. A lease of farm land contained a right of renewal for a further term of five years. The lessee was required under the lease to plough and re-grass at least ten acres of a certain portion of the demised land each year. He had failed to comply with this covenant at all and the lessor refused to renew. The lessee had, however, incurred considerable expenditure and invested much labour upon the property in the expectation that he would have the renewal of the lease for a further term of five years. In weighing up these factors McGregor J said (p 1187):

> In the present case, it seems to me that bearing in mind the expenditure incurred by the lessee and the recognition that it could not be expected that this would be recouped except during the renewed term, it would be unfair to require the lessee to vacate the property, despite the breach which I have found in respect of one covenant in the lease. The Court is empowered to grant relief on terms as the Court, in the circumstances of each case, thinks fit. I think, if relief is given on suitable terms, the respondents will not be prejudiced.

In granting relief, however, McGregor J imposed the requirement that the lessee regrass at the rate of sixteen acres per year instead of ten acres as required by the covenant. By this measure he ensured that the pasture at the expiration of the lease would be in good heart.

A second case which illustrates the factors operating, but with a somewhat different background, is *Re a Lease, McNaught to McNaught* [1958] NZLR 72. The case involved an option to renew and to purchase in a lease by a father to his son. The value fixed for the purchase was sixty pounds per acre which at the time of the purported exercise of the option was very much under value. The son's notice of exercise of the option was given fourteen days late. As happens so often in these circumstances the claim developed into a highly emotional family dispute with affidavits by various parties alleging misconduct on the part of the son. The situation was particulary exacerbated by the fact that the father had married twice and both families were at odds. One of the many points which arose was whether the

Should the Courts consider the unfairness of granting relief which would, because of inflation, reduce the shares of other beneficiaries?

Courts should consider the unfairness of the granting of relief on the basis that it would reduce, because of the effect of inflation, the entitlement of the other beneficiaries, a submission more commonly heard in proceedings under the Family Protection Act 1955. Henry J rejected this submission, holding that the bargain was obviously regarded as proper and beneficial by the deceased father when it was made and such an argument would be of little moment if he had survived and was of even less moment "in the mouths of the beneficiaries" (p 76). At a later stage Henry J when balancing up all the factors provided the following useful comment (p 77):

> Several factors were pressed as having sufficient cogency and weight to cause the Court to exercise its discretion. These may be shortly adverted to. It was claimed that the property itself was in no way jeopardised by the lessee's conduct and this is undoubtedly so. The property has been well farmed and is considerably improved since

the applicants took it over. The breach was trifling and the passage of time was short, and as a result the applicant was likely to be a heavy loser not only of valuable rights but also of substantial sums of money he had expended on improving the property upon reliance on his right ultimately to acquire the property. The close relationship between father and son and the extreme likelihood that strict technical compliance between them would not be insisted upon is also of importance.

Needless to say, relief was granted subject to the lessee paying costs.

It is worthwhile listing the factors relied upon by the Judge:

(a) Absence of prejudice to the lessor — the property was not "jeopardised" by the lessee's conduct;
(b) The breach was trifling and technical;
(c) If relief was not granted the lessee would lose not only the value of the renewal but also substantial sums of money he had spent on the property;
(d) The close relationship between the lessor and the lessee and "the extreme likelihood" that the deceased's father would not insist upon strict technical compliance;
(e) The attitude of the beneficiaries was that they wanted to take advantage of a technical slip which would probably have been overlooked by the lessor himself.

As the beneficiaries had filed affidavits containing "much extraneous and unnecessary matter" Henry J stated that the lessee should not be called upon to bear all the costs of the affidavits. He did not fix the amount of costs but reserved leave to the parties to apply. His intention was clear.

A practical application of the discretion under s 120 arose from a hearing in the High Court in New Plymouth late in 1980. In *Besseling & Bracegirdle Restaurants Ltd v Bali Restaurants Ltd* (supra, n 15), a dispute arose over the lease of the Bali Restaurant in Napier. The lease contained a "best endeavours" clause ie that the lessee company would use its best endeavours to increase and extend the custom of the restaurant. The major shareholder in the lessor company became aware that the two major shareholders in the lessee company were interested in purchasing the restaurant La Scala sited next door. To thwart this operation he purchased the La Scala himself. Later the two shareholders of the lessee company purchased a third restaurant called the Golden Harvest which was in the same street. Hardie Boys J held that the purchase of the Golden Harvest did not constitute a breach of the best endeavours clause but as matters progressed the continuing operation did. The Judge found (p 31) that the Golden Harvest had played some part in the reduction of custom but it was impossible to say how significant its part had been. He found certain other minor breaches such as the failure to replace linoleum. In general he found that the shareholders of the lessee company had no intention to develop the Golden Harvest at the expense of the Bali and that the breaches were minor and not deliberate. He granted relief on terms as to advertising and against competition with the Golden Harvest.

In the exercise of the discretion the Court will consider whether the lessee has been guilty of dishonesty or impropriety and has come to the Court "with clean hands". Lack of candour and failure to disclose all material factors may cause the Court to refuse an application in favour of the lessee.[19] The preponderance of reported cases in which relief has been granted under s 120 of the Property Law Act 1952 involve either failure to give notice of exercise within time, or the efficacy of purported exercise.[20] Relief has been granted, however, in respect of breaches by lessees/operators of licensed premises upon conviction for licensing offences not likely to lead to forfeiture of the lease;[21] of a covenant against the carrying on of competing trades;[22] of a covenant to plough and regrass a certain portion of a farm each year;[23] and of the covenant against subletting.[24] Although not clearly stated in the authorities, it seems likely that the attitudes manifested in applications for relief under s 118 of the Property Law Act 1952 against forfeiture of leases, such as the strict approach to the breach of the immoral user clause,[25] will develop under s 120. What may be stated with certainty is that the Courts have found no difficulty in granting relief in respect of either the right of renewal or the option to purchase where the breach has been technical and little prejudice is suffered by the lessee. (*Re a Lease, Kennedy to Kennedy*; *Re a Lease, Aotea District Maori Land Board to Cockburn* [1941] NZLR 629; [1941] GLR 384; *Re a Lease Wanganui City Corporation to Knight* [1943] NZLR 13; [1942] GLR 483; *McGregor Motors Ltd v Barton* [1956] NZLR 297; *Re Carter v Te Aotonga Rangiheuea*; *Jane v Ben Hall Properties Ltd* [1977] 2 NZLR 536; *Ross v Henderson*.)

One point which does not seem to appear on the face of the authorities is a difference in approach between applications in respect of the option to purchase and those relating to the right to renew. It seems more than likely that differences will evolve: for instance, the very fact that the option to purchase involves a transfer of the fee simple and, ergo, termination of the relationship of lessor and lessee would seem to suggest a different treatment. Relief in respect of the right of renewal involves continuation of the relationship, whereas that in respect of the option to purchase, when the fee simple passes, does not. If the lessee is buying the property at a fixed price, does it matter that he has not regrassed paddocks for a period? The viability of the working relationship between the parties can be relevant only if the lease is to be renewed, and would seem of little significance if the lease is to merge in the freehold reversion. If this is the case, to what extent should a Court refuse to grant a lessee relief just because the lessee is in breach of the covenants in the lease? All these remain questions for the future.

It is now possible to set out briefly certain specific factors which might become relevant upon the granting of relief:

(a) Prejudice/compensation

One factor of obvious importance is the question of the degree to which the lessor has been prejudiced by the breach and whether he can be compensated for this. In *Re a Lease, Kennedy to Kennedy* [1935] NZLR 564; [1935] GLR 539 Reed J said, after pointing out that the granting of relief deprives a lessor of a right to which he is entitled under the contract (at 567, 541):

> The paramount question is whether, apart from the deprivation of that right, the lessor would be otherwise prejudiced by the grant of an order.

Compensation is an important factor in the granting of relief both under s 118 and s 120.[26] It will be recalled that in *Carter v Te Aotonga Rangiheuea* [1957] NZLR 1184, McGregor J granted relief following the lessee's total non-compliance with the grassing covenant on the condition that

the lessee regrass at the rate of sixteen acres per year, not ten acres as required by the covenant. In *Henderson v Ross* the exercise of the option was disputed and the lessee had continued to farm the property after expiry of the lease. At first instance Quilliam J granted relief but imposed the condition that the lessee pay $9,000 for use and occupation of the property since the expiration of the lease. $9,000 represented a little less than the rental agreed on by the parties at the execution of the lease in 1971 of $3,000 per annum. On appeal Cooke J held that some increase was "appropriate".[27] The Court, comprising Cooke, Somers and Vautier JJ, unanimously vacated the order made in the lower Court and substituted a condition that use and occupation be quantified as simple interest at seven percent from the expiry date.

(b) Wilful disregard of contractual obligations

The Courts take a stern view of lessees who deliberately flout the terms of their leases.[28] In *Shiloh Spinners Ltd v Harding* [1973] AC 691, 725; [1973] 1 All ER 90, 103, Lord Wilberforce speaking of forfeitures of leases said:

> Established and, in my opinion, sound principle requires that wilful breaches should not, or at least should only in exceptional cases, be relieved against, if only for the reason that the assignor should not be compelled to remain in a relation of neighbourhood with a person in deliberate breach of his obligations.

This principle applies under s 120. In *Besseling & Bracegirdle Restaurants Ltd v Bali Restaurants Ltd* Hardie Boys J was clearly concerned to determine whether the breaches were wilful and said: (p 31) "The specific breaches were minor and were not deliberate in the sense that there was no wilful disregard of contractual obligations. So far as the more general breach is concerned, this was not wilful either." If the Court had found that the breach was wilful then relief would have been refused, but as it did not, relief was granted.

(c) Disparity in value

In many instances disparity in value is the underlying reason for the lessor's resistance to the enforcement of the option. A signed bargain willingly entered into by both parties can be seen to become invidious with the passage of years. But the Courts firmly refuse to consider disparity in value as a basis for refusal of relief.[29] In *Henderson v Ross* the price was fixed under the option at $65,000 when the final value of the property in 1975 was $200,000. Quilliam J said ([1979] 2 NZLR at 300) when considering the question of disparity:

> In the present case it must be assumed that when the lease was signed the purchase price was a reasonable one. The whole transaction was negotiated on a normal basis and there is certainly no evidence from the defendant to suggest that the price was arrived at through any pressure upon him or was in any way unfair. If, therefore, the option had been exercised at the contemplated time no question of inadequacy of consideration could have arisen. . . . I realise that it will be the very fact of the substantial increase in value which will have prompted the defendant to resist any question of sale with the determination that he has, but I am unable to say that it is a factor in this case which ought to mean that I should withhold relief if it seems that in other respects relief should be granted.

The Court of Appeal unanimously affirmed the decision of Quilliam J. Somers J based his decision on the option which he found had been validly exercised, without recourse to s 120. He said in passing (at p 434) that if it was necessary to rely on s 120 then he agreed with the approach of Cooke J. Vautier J tended to follow Somers J. Cooke J affirmed the approach taken by Quilliam J as to disparity.

(d) Acquiesence, approval, condonation

As the option situation does not necessarily involve the forfeiture process — the lessor does not move to determine the lease and it is for the lessee to establish his rights — there is strong authority for the proposition that the doctrine of waiver does not apply where parties might rely on s 120.[30] A lease containing a covenant for renewal or purchase has a twofold operation. First, it is a grant of the demised premises for the term of years specified therein; secondly, it is a contract for the renewal or the sale and purchase of the reversion on the condition precedent that the covenants of the lease have been duly performed.[31] In the eyes of Edwards J:[32]

> Breaches of the covenants may be waived so far as concerns the forfeiture of the existing term, but that waiver does not operate as a waiver of the performance of the covenants as a condition precendent to the grant of a renewed lease.

However, factors which might otherwise amount to waiver if the landlord and tenant relationship was truly applicable may possibly give rise to an estoppel[33] or become a factor relevant to the exercise of the discretion under s 120.

In *McGregor Motors Ltd v Barton* [1956] NZLR 297, the lessor owned a building at Papatoetoe and occupied the front portion in which it carried on the business of motor service station. The lessee occupied the rear portion of the same building under an agreement for lease and carried on the business of motor engineer. The agreement for lease contained a covenant against carrying on business in opposition to the lessor. It was proved that the lessee sold cars from the premises. However, evidence was also given that the lessor had for a considerable time been aware of this practice and that at one period it kept a record of the cars sold by the lessee while still accepting rent. Shorland J considering the question of waiver said (p 301):

> It seems to me, accordingly, that waiver, whilst it operates to answer the plaintiff's claim to forfeiture, does not enable the defendants to claim that they have strictly complied with the condition precedent to the granting of a right of renewal provided for in the clause under discussion. However, the circumstances are such that in my view the matter is one in which the defendants are entitled to relief under s 120 of the Property Law Act 1952, and that the case is one in which the Court should decree an order that the plaintiff grant to the defendants a renewal. . . .

In effect, Shorland J found that the doctrine of waiver was inapplicable but nevertheless the fact that the lessee, knowing of the practice in contravention of the covenant, failed to raise any objection, merely permitting it to continue, was a factor which supported the granting of relief.

(e) Third parties

The powers of the Court upon grant by the lessor of an estate or interest in

favour of a third party are specifically dealt with in s 120(7):

> (7) The fact that the lessor may have granted any estate or interest in the demised land to any person other than the lessee, which estate or interest would be defeated or prejudicially affected by the grant of relief to the lessee, shall not affect the power of the Court under this section, but in any such case the Court may if it thinks just grant relief to the lessee and cancel or postpone any such estate or interest and may if it thinks fit assess damages or compensation to be paid to that person in respect of the defeat of or prejudicial effect upon the estate or interest. Any damages or compensation to be paid in accordance with this subsection shall as the Court may determine be payable either by the lessor or by the lessee, or partly by the lessor and partly by the lessee in proportions to be fixed by the Court.

The Court has power to order either the lessee or lessor to pay compensation or damages to the third party

This subsection awaits close judicial interpretation and its exact effect remains a little obscure. The Court has power to order either the lessee or lessor to pay compensation or damages to the third party. Where land is demised by will subsequent to the execution of a lease containing an option to purchase, the specific devisee is entitled to the proceeds of the sale in the event of the option being exercised but not to an award of compensation under s 120(7) (*Verran v Public Trustee* [1976] 1 NZLR 518). But what do the words "shall not affect the power . . ." mean? Does the subsection supersede the indefeasibility provisions of the Land Transfer Act 1952?[34] Does the subsection mean that the Court is to exclude altogether from its considerations the fact that a subsequent purchaser may be prejudiced? Such an intepretation seems rather extreme, and it is likely that the intention of the legislature was to spell out the powers that may be exercised in favour of a lessee even if a subsequent grant has intervened, leaving the matter discretionary. It is submitted, at this stage somewhat tentatively, that prejudice to a third party remains a factor to be considered by the Court in the exercise of its discretion. Nevertheless s 120(7) serves grim warning on over-eager lessors who sell before expiration of the three months time limit contained in s 121 of the Property Law Act 1952.

5 Failure to give notice

Relief upon failure to give notice within time has been specifically incorporated within the Court's power to grant relief by statute. Until 1976 this ground was contained in a separate subsection ie s 120(6) of the Property Law Act 1952. However, s 3(1)(b) of the Property Law Amendment Act 1976 now incorporates this power within a substituted s 120(3)(b) by inclusion of the words "or has failed to give to the lessor notice of his intention to require or to accept the renewal of a lease or a new lease or an asssurance of the lessor's reversion". In *Henderson v Ross* counsel for the lessor submitted that s 120 did not apply where the lessee had failed to give notice. Counsel relied on the words in s 120(3)(a), arguing that failure to serve notice at all did not constitute non-compliance with "certain covenants, conditions, or agreements by the lessee. . . ." Cooke J, in whose judgment in this respect both Somers and Vautier JJ concurred, rejected this argument, holding that s 120 applies both where the notice is defective and where it has not been sent at all. Consistent with the clear statutory intent of s 120(3)(b), the preponderance of authority is clearly in favour of granting relief where notice of election of option has not been given in time.[35] In *Re a Lease, Aotea District Maori Land Board to Cockburn*, the covenant created an option of renewal exercisable within three months prior to the expiry of the lease. As a result of inadvertence the lessee had failed to give the appropriate notice until almost seven months after the lease had expired. Blair J grant relief. Although the lessor Board had indicated that it was prepared to abide by the decision of the Court, nevertheless the case stands as some indication of the lapse of time which the Court is prepared to countenance. In *Re a Lease, Wanganui City Corporation to Knight*, the notice was almost four months overdue but relief was granted. Johnston J said (p 16):

> There is, however, express provision that failure by a lessee to give to the lessor notice of intent to renew shall not limit either the rights of the lessee or the powers of the Court under the section. I think it would be inconsistent with the intention of the Legislature and the meaning of the section to hold that failure to give notice of intention to renew could be excused in the case of a lessee in default in respect of covenants such as that to pay rent punctually or to repair and could not be excused where the only default of the lessee, as here, is failure to give the required notice. Taking the section as a whole, it appears to me that if effect is to be given to the provision that the lessee's rights and the Court's powers are not be affected by failure to give notice of renewal, it is clear the Court is given power to grant relief in those cases where the lessee's only default has been failure to give notice as required.

In *Henderson v Ross* the covenant containing the option required exercise "at any time during the term". The term expired on 1 June 1976. Notice had been sent on 23 December 1975 but the required cheque was not included in compliance with the covenant and the consent of the Administrative Division of the Supreme Court was not obtained in accordance with the Land Settlement Promotion and Land Acquisition Act 1952. On 23 March 1976 a second attempt was made to exercise the option but, as found by Quilliam J, the notice was not enclosed in the envelope, which was not in any event received by the lessor, who had deliberately refused to collect registered mail. Notice was finally personally delivered on 4 April 1977 together with $6,500 in cash as required by the covenant. All Judges held that relief should be granted under s 120 but Somers J was prepared to overturn the finding of Quilliam J that the notice was not enclosed in the envelope forwarded on 23 March 1976. Somers J found that the option had been validly exercised.

6 Conclusion

As has already been pointed out, if it were not for s 120 a single breach of covenant, however minor, might disentitle a lessee from the right to exercise his option. The number of recent decisions in this area demonstrates the continuing utility of the power to relieve. It is hoped that this article provides some assistance to counsel involved in the preparation and conduct of applications under s 120.

1 *Dumfraville v Lonstede* (1308-9) YB 2 & 3 Edw II; 19 Sel Soc 58 per Bereford J; *Scott v Hammon* (1313-14) Eyre of Kent 6 & 7 Edw II vol ii; 27 Sel Soc 26 per Staunton J; *Anon v Anon* (1313-14) Eyre of Kent 6 & 7 Edw II vol iii; 29 Sel Soc 85 per Spigurnel J.

2 *Emanuel College v Evans (1625) 1 Chan Rep 18; 21 ER 494; Pope v Day* (1635) 1 Chan Rep 96; 21 ER 518; *Underwood v Swain* (1649) 1 Chan Rep 161; 21 ER 537; *Finch v Finch* (1676) 73 Sel Soc 403; *Bowen v Whitmore* (1693) 2 Free 192; 22 ER 1155.

3 Section 3(6) of the Landlord and Tenant Act 1912 (West Aust) appears to follow s 94(6) of the Property Law Act 1908.

4 *Nash v Preece* (1901) 20 NZLR 141 at 152, 3 GLR 439 at 442, CA. See also Edwards J at 166, 449 and Cooper J at 172, 452.

5 Edwards J considered *Greville v Parker* [1910] AC 335; NZPCC 262, PC, to be "demonstrably wrong" see *Chrystall v Ehrhorn* [1917] NZLR 773 at 778.

6 *Finch v Underwood* (1876) 2 Ch D 310; *Bastin v Bidwell* (1881) 18 Ch D 238; *Robinson v Thames Mead Park Estate Ltd* [1947] Ch 334; [1947] 1 All ER 366, 344; *Hare v Nicoll* [1966] 2 QB 130; [1966] 1 All ER 285, CA. *United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd* [1968] 1 WLR 74; *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904.

7 See *Re a Lease Aotea District Maori Land Board to Cockburn* [1941] NZLR 629 at 637, per Blair J.

8 *Vince Bevan Ltd v Findgard Nominees Ltd* [1973] 2 NZLR 290, CA, at 295, per Turner P. "Lease" is defined by s 117 of the Property Law Act 1952 and excludes the licence, see *Hull v Parsons* [1962] NZLR 465; *Daalman v Oosterdijk* [1973] 1 NZLR 717.

9 Section 120(3)(b) of the Property Law Act 1952 as substituted by s 3 of the Property Law Amendment Act 1976; *Besseling & Bracegirdle Restaurants Ltd v Bali Restuarant Ltd* (unreported, New Plymouth, 5 May 1981, Hardie Boys J, A36/80).

10 Section 120(3)(c) of the Property Law Act 1952 as substituted by s 3 of the Property Law Amendment Act 1976.

11 *Verran v Public Trustee* [1976] 1 NZLR 518; *Jane v Ben Hall Properties Ltd* [1977] 2 NZLR 536; the Court of Appeal did not consider s 120, see [1979] 2 NZLR 68; *Henderson v Ross* [1979] 2 NZLR 284; [1981] 1 NZLR 417 (CA).

12 The Property Law Act 1952, s 120(2). When relief is granted of Maori Land s 120(2) provides that a confirmation order will be granted as a matter of right.

13 *Vince Bevan Ltd v Findgard Nominees Ltd* at 300, per McCarthy J; *Jane v Ben Hall Properties Ltd*; *Besseling & Bracegirdle Restaurants Ltd v Bali Restaurants Ltd.*

14 *Finch v Underwood*; *Bastin v Bidwell*; *Robinson v Thames Mead Park Estate Ltd*; *Hare v Nicoll*; *West Country Cleaners (Falmouth) Ltd v Saly*; *Swift New Zealand Company Limited v Owen.*

15 Unreported, New Plymouth, 5 May 1981, A36/80 at 5.

16 At 298, per Turner P, at 301, per McCarthy, and at 303, per Richmond J. See also Lowe, Time Limits and Relief against Forfeiture of a Lease (1977) NZLJ 173.

17 *Reporoa Stores Ltd v Treloar* [1958] NZLR 177, CA; *Vince Bevan Ltd v Findgard Nominees Ltd*; *Verran v Public Trustee*; *Jane v Ben Hall Properties Ltd.*

18 *Nash v Preece*; *Bray v Kuch* (1909) 28 NZLR 667; 11 GLR 641; *Woods v Tomlinson* [1964] NZLR 399; *Watson v Healy Lands Ltd* [1965] NZLR 511; *Kitching v Schimanski* (unreported, Auckland, 11 June 1974, Chilwell J, A238/74); *Hunt v Watson* [1975] 2 NZLR 592.

19 *Smith v Dawson* (1884) 2 NZLR 411 at 413, per Williams J; *Re a Lease, McNaught to McNaught* [1958] NZLR 72 at 76, per Henry J.

20 *Re a Lease, Aotea District Maori Land Board to Cockburn* [1941] NZLR 629; [1941] GLR 384; *Re a Lease, Wanganui City Corporation to Knight* [1943] NZLR 13; [1942] GLR 483; *Verran v Public Trustee*; *Jane v Ben Hall Properties Ltd*; *Henderson v Ross.*

21 *Ellis and Burns v Hutcheon* [1928] NZLR 655; [1928] GLR 301; *Re a Lease, Kennedy to Kennedy* [1935] NZLR 565; [1935] GLR 539.

22 *McGregor Motors Ltd v Barton* [1956] NZLR 297; although the lessor had been aware of the offending practice and approved it. *Besseling & Bracegirdle Restaurants Ltd v Bali Restaurant Ltd.*

23 *Carter v Te Aotonga Rangiheuea* [1957] NZLR 1184.

24 *Nash v Preece* (1901) 20 NZLR 141, CA; 3 GLR 439 at 442.

25 *Rugby School (Governors) v Tannahill* [1935] 1 KB 87, CA; *Egerton v Esplanade Hotels, London, Ltd* [1947] 2 All ER 88; *Hoffman v Fineberg* [1949] 1 Ch 245; [1948] 1 All ER 592; *Borthwick-Norton v Collier* [1950] 2 KB 594, [1950] 2 All ER 204, CA; *Grand Junction Co Ltd v Bates* [1954] 2 QB 160, [1954] 2 All ER 385; *Glass v Kencakes Ltd* [1966] 1 QB 611, [1964] 3 All ER 807; *Central Estates (Belgravia) Ltd v Woolgar (No 2)* [1972] 1 WLR 1048; [1972] 3 All ER 610, CA; *GMS Syndicate v Gary Elliot Ltd* [1981] 2 WLR 478.

26 *Hill v Barclay* (1810) 16 Ves Jun 402; 33 ER 1037; (1811) 18 Ves Jun 238; 34 ER 238. *Eyre v Rea* [1947] 1 KB 567; [1947] 1 All ER 415; *Duke of Westiminster v Swinton* [1948] 1 KB 524; [1948] 1 All ER 248; *Shiloh Spinners Ltd v Harding* [1973] AC 691; [1973] 1 All ER 90.

27 [1981] NZLR 426.

28 *Hill v Barclay* (1810) 16 Ves Jun 402; 33 ER 1037; (1811) 18 Ves Jun at 56; 34 ER 238; *Rose v Spicer* [1911] KB 234; *Hyman v Rose* [1912] AC 623; *Creery v Summersell and Flower Dew & Co Ltd* [1949] 1 Ch 751; *Platt v Ong* [1972] VR 197; *Shiloh Spinners Ltd v Harding* [1973] AC 691 at 723; [1973] 1 All ER 90 at 103 per Lord Wilberforce, at 726 and at 103 per Viscount Dilhorne; at 726, and at 104 per Lord Simon of Glaisdale.

29 *Re a Lease, McNaught to McNaught* [1958] NZLR 72 at 76, per Henry J; *Verran v Public Trustee* at 521 per Mahon J; *Ross v Henderson.*

30 *Nash v Preece* at 167 per Edwards J; *Chrystall v Ehrhorn* at 779 per Edwards J; *McGregor Motors Ltd v Barton* at 301 per Shorland J; *Swift New Zealand Company Limited v Owen* at 36 per Prichard J.

31 *Chrystall v Ehrhorn.* See also *McGregor Motors Ltd v Barton* at 301 per Shorland J.

32 *Chrystall v Ehrhorn* at 779 and at 563 per Edwards J.

33 As in *Central London Property Trust Ltd v High Trees House Ltd* [1947] 1 KB 130 which, however, involved a lease not an option.

34 Relief will not be granted under s 118 of the Property Law Act 1952 where the lease has been duly registered in the name of a third person; see *Maori Trustee v Kahuroa* [1956] NZLR 713.

35 In *Re a Lease, Aotea District Maori Land Board to Cockburn*; In *Re a Lease, Wanganui City Corporation to Knight*; *Vince Bevan Ltd v Findgard Nominees Ltd*; *Verran v Public Trustee*; *Jane v Ben Hall Properties Ltd*; *Henderson v Ross.*

Books

Credit Contracts Act

By D F Dugdale, Butterworths, 1981, vii + 9, $16.50

Reviewed by *Anthony Grant*

FEW legal texts of great worth pass out of publishers' doors in New Zealand. There are a reasonable number of books for law students, but beyond graduation these will not so much *in* as *ob*struct: like potted plants they are potted texts which will wither if planted outside, needing all the shelter and protection which a gentle LLB curriculum can provide.

There is a third category of book: the commentary on an Act of Significance, of which this is one. Of these works, all lawyers are obliged (both to themselves and to the author) to have a copy unless the degree of scholarship is so slight that the words of Parliament as set forth by the Government Printer seem majestic by comparison. Book reviews will neither encourage nor discourage the sales of the rest: they are quite simply essential. This is, after all, the land with uncommon laws concerning family protection and the enforcement of testamentary promises (to refer to only two Acts) where there is no current commentary on the one and no full commentary at all on the other. (Busy barristers and solicitors are entitled to wonder what all the professors, associate professors, senior lecturers and junior lecturers in all our law faculties do all day).

Amidst commentaries on Acts of Significance this book is valuable in at least two respects. The first is that this is an Act of Significance if ever there was one. And the second is that Mr Dugdale is not simply the first person to have read the Act and written about it: he was actually on the committee which told our elected representatives in Wellington what to say, and why, before they said it. Although having said that it should be added that they never say precisely what they are asked to and that is another reason why this book is all the more important. The reader can discover which of the words used were recommended and which of the words used were not; what the former were intended to mean and what the latter may mean; and all in Mr Dugdale's engagingly direct and concise style.

There is a fashion in law journals to add to all book reviews some words of caution about the work reviewed such as the inadequate treatment of this or the superfluous treatment of that, or if all else fails, the failure of the printer to put full stops where they should be (which art is carried to absurdity by reproving as a culprit of last resort the proof reader for incompetence).

Even if the fashion should be followed, this book does not pretend to be the kind of work to which such treatment should be given. Its function is to educate the masses and not to engage the fancy of the few.

As it does educate, and we all need education on this Act, every firm will have at least one copy.

One thing more should be said. Mr Dugdale wrote in the preface to the third edition of his book on Hire Purchase law:

> I confess that when at 25 years of age I shunned delights and lived laborious days in order to write the first edition of this book I did not clearly foresee that the moral obligation to keep it up to date would remain slung around my neck forever like a putrescent albatross.

On behalf of the combined profession we take the liberty of expressing our hope to Mr Dugdale that this book should not be a second putrescent albatross. No man should be cursed with two.

Obituary

Mr F G Hall-Jones

ON 4 February a special sitting of the District Court was held at Invercargill in memory of Mr Frederick George Hall-Jones who died on 28 January 1982, aged 90 years. Tributes were paid by Mr J S Mee, President of the Southland District Law Society, and Judge E B Anderson, who presided.

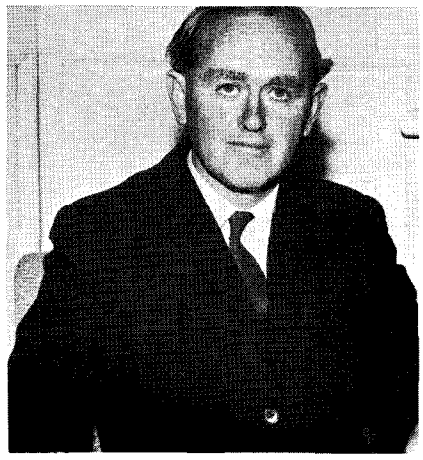
Mr Hall-Jones was a son of Sir William Hall-Jones, Liberal MP for Timaru and Prime Minister, 1906. He was educated at Timaru Boys High School and graduated with BA and LLB degrees at Victoria University in 1913. He was admitted to the bar in 1914 and worked briefly for R P Towle in Auckland before enlisting. He served as sergeant-major with the Main Body, took part in the Gallipoli landing and was severely wounded at Quinn's Post in June 1915.

After being invalided home Mr Hall-Jones was given medical advice that he should move to a cool climate, and thus came to Invercargill where he acquired the practice of R H Rattray (1917). In earlier years he was engaged actively in common law work, but later confined himself to conveyancing and commercial work. He still held a practising certificate at the date of his death, and may have been New Zealand's oldest living practitioner. His firm (Hall-Jones & Sons) is now carried on by two of his sons.

Mr Hall-Jones served on the Invercargill City Council and was the National Party candidate for Invercargill in the 1938 election. He was deeply and actively involved in numerous aspects of local affairs. A former district governor of Rotary International for New Zealand, he was in 1972 made a Paul Harris fellow, Rotary International's highest service award.

He spent much of his life collecting the historical records of Southland, and was the author of several historical books. For his services in recording the history of Southland and his many other activities Mr Hall-Jones was awarded the OBE in 1958.

Compensation for the "mental consequences" of an accident



A P Blair, LLM

Preliminary

THE definition of "personal injury by accident" in the Accident Compensation Act includes "the mental consequences of any such injury or of the accident". Accordingly, mental injury is compensable in the same way as physical injury, provided it is *the consequence* of an accident. Thus cover exists not only for mental damage which is part of a physical injury (eg brain damage caused by trauma), but also for disease or malfunction of the mind which is proved to be produced by the occurrence of an accident (eg a psychiatric illness or neurosis resulting from being injured or involved in an accident). The latter kind of damage may not manifest itself for some time after the accident.

The scope of mental consequences

The mental consequences of an accident may range from minor distress to an extinguishment of mental powers. In the common law, compensation for mental consequences are usually considered under the headings of loss of enjoyment of life, loss of amenities, pain and suffering, neurosis or mental aberration. These headings embrace most of the kinds of mental damage which may follow an accident. The Act in s 120 has adopted the common law guidelines (this is to be expected in a statute which has extinguished the common law claim for damages) and has made provision for lump sum compensation up to a limit of $10,000 for these kinds of injury. The loss or damage must, however, be more than insignificant — see the proviso to subs (1) of s 120. The proviso is consistent with the common law attitude — "If negligence has . . . caused an unpleasant emotion of more or less transient duration an essential constituent of a right of action for negligence is lacking" (*Dulieu v White and Sons* [1901] 2 KB 669, 673). Mere grief is not actionable — see for example *McLoughlin v O'Brian* [1981] 1 All ER 809 at 823. But if there is a "sufficient degree" of damage the accident victim will not only be eligible for a lump sum payment under s 120, but may also qualify for rehabilitation aid, earnings related compensation and perhaps other forms of aid. Should the mental damage be co-existent with a physical impairment or loss, the claimant will also receive a lump sum award under s 119.

Identifying the mental consequences

The identification of mental damage in relation to a traumatic event and the measurement of this damage in money terms present obvious problems. Precise assessment of physical damage is difficult enough; the evaluation of mental disorder is still more elusive. In *Bourhill v Young* [1943] AC 92 at 103, Lord Macmillan said: "In the case of mental shock, there are elements of greater subtlety than in the case of an ordinary physical injury". Because of the uncertainty of diagnosis which often attaches to a claim based on mental injury (this being contributed to by diverse views sometimes expressed by medical men) there has been in the past some judicial scepticism as to the weight to be given to both lay and medical evidence in this area. However, it is now well established that mental injury caused by the fault of another is compensable at common law. "The crude view that the law should take cognisance only of physical injury resulting from actual impact, has now been discarded" (*Bourhill v Young* (supra) 107). "Damages are recoverable . . . for any recognisable psychiatric illness caused by the breach of duty" (*Hinz v Berry* [1970] 1 All ER 1074 per Lord Denning MR at 1075).

As indicated, the Accident Compensation Act has accepted that the mental consequences of an accident are compensable, but, as in the common law, the difficulties of proof remain. The establishment of liability for the mental consequences of an accident depends on wise evaluation of the lay evidence considered with the opinions of physicians, psychologists and other experts. The evidence may raise questions of weight, credibility, fraud, malingering, exaggeration, neurosis, etc. The quality of the expert professional evidence and its examination of the past record of the claimant will be significant. Cantor, in *Traumatic Medicine and Surgery* (1959) Vol 1 p 8, makes the point that "the past history is of great significance in unravelling the relationship of trauma and disease." But in the final analysis it will be for the arbitrator to "resolve the conflict of medical testimony" and "to determine questions of fact and . . . it is desirable that there should be finality even if there may occasionally be cases where it may be thought that a wrong answer to a question was given in the first place. This is a commonplace in all litigation," per Lord Hodson in *R V Deputy Industrial Injuries Commissioner ex parte Amalgamated Engineering Union* [1967] AC 725 at 750.

The scope of the statutory claim

Some of the common law problems relating to claims for mental injuries are avoided by the Act. Like the common law, the Accident Compensation Act is concerned with cause and effect (ie that the mental damage complained of was the result of an accident) but it is not concerned with fault, duty of care or foreseeability. To recover compensation under the Act, a claimant has only to satisfy the Corporation that

his mental damage was the consequence of an accident or resulting injury and it matters not whether his injury was caused by another's negligence or even his own. Where the claim for such injury is associated with an accident in which the claimant received significant physical injury, then "mental consequences" might be readily inferred. But a claimant who alleges that a mental disability has resulted from a minor accident, or one in which he was not physically involved, may have to overcome an initial barrier of incredulity. Nevertheless, a person will not be barred from compensation because he is more vulnerable to stress than the average person. The "thin skull" principle mentioned in *Dulieu v White* (supra) applies to both physical and mental damage. "There is no difference in principle between an eggshell skull and an eggshell personality" (*Malcolm v Broadhurst* [1970] 3 All ER 508 at 511).

The "thin skull" principle applies to both physical and mental damage

The Accident Compensation Act also avoids some of the notorious difficulties that Judges and juries face in negligence claims in translating serious mental injury into damages. As the Act allows only a maximum award of $10,000 under s 120, then in the grave claims the Corporation can do no more than award the maximum. However, this seemingly modest award for serious injury will almost certainly be supplemented by other forms of compensation and, seen in the context of the scheme of the Act, the overall aid for serious injury is substantial, and indeed may be considered more appropriate to an accident victim than the crude common law method of awarding lump sum damages at the time of the trial or settlement by a process of speculating on future needs. Instead of this "once only" method, the Act makes provision for moderate lump sum awards under ss 119 and 120, but in addition the Corporation may grant periodic payments which stretch into the future and which will move upwards in sympathy with inflation. Thus, if the injured person had been an "earner" his earnings related compensation may continue until age 65 or later, (see s 128). He may also receive medical and para-medical care for the rest of his life and if he is in need of "constant personal attention" (eg a person with serious permanent brain damage) the Corporation may pay all or part of the fees of a nursing home or for home help until the end of the patient's days (see s 121(3)). Other forms of compensation, including rehabilitation training, may be available to him and aid might also be given to his dependants.

Mental injury independent of physical injury

In the law of tort, damages for mental injury may be recoverable even though the plaintiff himself was not physically damaged by the accident. Thus, in the well known case of *Dulieu v White* (cited supra) a negligent defendant drove a van into a public house where the plaintiff was behind the bar. She was pregnant and, though not physically injured, was severely shocked by the incident. Later she gave birth prematurely to a mentally retarded child. The Court held that there was a breach of duty to her and that the damage was not too remote. "Once get the duty and the physical damage following on the breach . . . and I hold that the fact of one link in the chain of causation being mental only makes no difference", per Phillimore J at p 685. The law of tort has, however, been troubled in establishing the boundary of liability in situations where the plaintiff has suffered mental damage though he was not directly involved with the negligent act. In *Bourhill v Young* (cited supra) the plaintiff alleged that she suffered a miscarriage as the result of hearing a collision. The House of Lords applied the foreseeability test to see whether the driver owed a duty to her and the claim was rejected. The modern position according to Fleming (*Torts* 5th ed 154) is that the test is whether the defendant created an unreasonable (foreseeable) risk of nervous shock to the plaintiff. This appears to be settled by the dictum in the *Wagon Mound (No 1)* [1961] AC 386 at 426. This notion was applied in *Malcolm v Broadhurst* [1970] 3 All ER 508 where a husband and wife had been injured through the negligence of the defendant. The wife's physical injuries were minor, but she had had pre-existing nervous trouble. This combined with the change of personality in her husband and his bad temper, created by the accident, resulted in the wife's mental problems being exacerbated. The Judge held that the exacerbation was a foreseeable consequence of the defendant's breach of duty, and the fact that it arose or was continued by reason of an unusual complex of events did not avail the defendant. This case may be compared with *Marx v Attorney-General* [1974] 1 NZLR 164 where it was held that a wife's claim that her mental illness was consequent upon her husband's injury was held to be outside the range of the common law. See also *McLoughlin v O'Brian* [1981] 1 All ER 809, (referred to infra).

As indicated previously, the administrators of the Act need not concern themselves with the foreseeability principle and its complications. Whether or not his injury was foreseeable, a claimant will receive statutory compensation provided his injury was the consequence of an accident.

The law relating to liability for damage for nervous shock, or other mental damage where the plaintiff was not physically touched by the accident, has been examined by the High Court of Australia in *Mount Isa Mines Ltd v Pusey* [1970] 125 CLR 383. While working for the defendant company plaintiff heard an electrical explosion and went to the scene of the accident, where two workmates had been horribly burned and both died later. The plaintiff assisted to bring out the injured men. Some weeks later, he developed a form of schizophrenia. The trial Judge held that the company was negligent in failing to instruct the workers in the proper way to use the equipment. He also found that the employer ought to have foreseen the possibility of an employee suffering the kind of psychological injury that the plaintiff developed. The High Court upheld the claim. Windeyer J at p 403 cited Lord Denning's words in *Hinz v Berry* (supra) where he had said "for the last 25 years, it has been settled that damages can be given for nervous shock caused by the sight of an accident, at any rate to a close relative." Windeyer J observed that the present plaintiff (Pusey) was not a relative and asked whether that mattered. He said "Courts have come — slowly, cautious step by cautious step — to give damages for mental disorders resulting from a man seeing another person hurt without himself having suffered physical injury or been in any peril of physical harm." Observing that it was an open question whether persons other than relatives could recover

damages for nervous shock simply from witnessing an accident, Windeyer J, after referring to some English decisions which supported the view that it was not only relatives who could succeed in these situations, said: "In my opinion we should follow these leads". The five Judges of the High Court were unanimous that the plaintiff should succeed on the facts and the law. The basis of their judgment in the words of Menzies J was that the shock and its consequences were "caused by the breach of the defendant's duty to the plaintiff and that the shock injury and the kind of illness which followed was of a kind or type which was reasonably foreseeable by the defendant in a general way." However, in his judgment, Windeyer J guarded himself "against it being thought that I express my opinion on what would be the result if the facts were significantly different." He went on to say that nervous shock resulting simply from hearing distressing news does not sound in damages in the same way as does nervous shock from witnessing distressing events.

Some of the dicta relating to causation in negligence cases may not be apt if applied to claims under the Act

The Judges in the *Mount Isa* case were of course dealing with the law of negligence and considering whether the duty of care could be extended to a person in the plaintiff's position. Their judicial observations must be read in the light of the tort conceptions of fault and foreseeability. Nevertheless, the principle that a person mentally injured, though not physically damaged, by his proximity to an accident may have a right to compensation is probably applicable under the statute as in the common law, though the application of the principle to particular cases may present nice problems. Windeyer J's note of warning mentioned in the previous paragraph makes the point. Certainly an over-compassionate interpretation of the statute would open the door to damage only remotely connected with an accident. Numerous variations of borderline situations can be envisaged. The exact boundary line will never be precisely settled, but in the final analysis it is policy considerations, ie legislative policy as interpreted by the administrators of the Act, which will regulate such claims.

Causation under the Act and in tort

When in a negligence case the Judges are talking about cause and effect and remoteness of damage, they are directing their minds to the conventions of the common law. Behind tort judgments is the negligence concept and, flowing from this, is the principle that a tortfeasor shall provide full restitution to an accident victim injured as a result of the former's breach of duty. But the tortfeasor cannot be held responsible for consequences which in law are regarded as too remote and, put simply, the foreseeability test is used to draw a line between injury which is compensable and that which is not.

Under the Act, this test is inappropriate. So long as a claimant's injury was the consequence of an accident, it matters not whether it was due to the fault of another and was foreseeable. It follows that some of the dicta relating to causation in negligence cases may not be apt if applied to claims under the Act. While under both systems causation determines liability, the kind of causal link required by the Act is less restrictive. The Act has created a new system of compensation with a wider area of cover. The breadth of this cover will have to be determined by the administrators of the Act, who must decide, in the context of the Act, whether on the facts a particular injury is the "consequence" of an accident. In so deciding, the administrators will use different criteria, but will face the same kinds of problem as do the common law Judges in finding the boundary line. Just as in a negligence case the Court has to determine whether an injury is the consequence of a negligent act by applying say the foreseeability and the "but for" tests, so under the statute there must be a causal link between the injury and some preceding accident. However, as indicated, the criteria are different. The Act is a remedial one, designed to cushion all persons in this country from the physical and mental consequences of an accidental injury. The administrators have the dilemma of giving effect to this remedial purpose, while at the same time avoiding an over-liberal interpretation of the Act which would erode its fundamental purpose of giving cover to *accident* injury but not, in general, to *disease* injury.

Faced with mental injury claims where the causal link between accident and illness is not distinct, (eg when the illness is not plainly caused by trauma) the task of the administrators will be to apply policy considerations as expressed or implied in the Act. In *Accidents, Compensation and the Law*, 2nd ed (1975), Professor Atiyah suggests that the more difficult causal problems might be resolved not only by an attributive inquiry, but by having regard to policy factors. Whether a particular mental illness is the consequence of an accident is determined in the final analysis by applying the policy of Parliament, as expressed in the Act. The duty of the administrator is to reconcile the basic purpose of the Act, which is to restrict cover to personal injury by accident, leaving disease conditions to other social welfare legislation, with the intention of the Act to give cover to those kinds of mental disease which can be accepted as a consequence of an accident. The fixing of a cut-off line is plainly a difficult matter. Cantor in *Traumatic Medicine and Surgery*, (1959) Vol I p 6, in considering the relation of trauma to the causation of disease, comments that "no generalisation can be made except to say that some diseases are caused by trauma, a great many are not, and on some, no doctor would commit himself." All that can be said is that if the Corporation is satisfied by expert professional evidence that the mental disease complained of is consequent upon an accident and not due to extraneous factors, it will be compensable. In cases where there is a history of mental disease, it may be speculative to infer that an accident is responsible.

As indicated, it is policy considerations extracted from the philosophy of the Act as expressed in that statute which will provide a means of drawing the boundary line in the borderline cases. This kind of approach was utilised by the Court of Appeal in *Marx v Attorney-General* (1974) 1 NZLR 164, where in a negligence case the relationship between mental disturbance of the appellant and the negligence of the respondent was remote. The appellant was the wife of a man who suffered brain damage because of the negligence of respondent. His personality was affected and the wife became mentally disturbed. A primary question was whether the duty of care extended to the wife. Beattie J commented that it was difficult to propound the limit of the duty, and asked, if the appellant was owed a duty, whether it would also be owed for example to her children or father-in-law, living with the family. In deciding the limits of the duty the Judge, after referring to authority, said that special classes of nervous shock and rescue cases have evolved primarily through

policy considerations, and he indicated that it was policy considerations which must decide whether the kind of damages suffered by the wife in the claim before the Court could be regarded as a consequence of the original breach of duty. The claim by the wife was dismissed. A review of common law cases in which the claimant was physically remote from the accident is contained in a recent case, *McLoughlin v O'Brian* [1981] 1 All ER 809. After a major accident seriously injuring her husband and children — one daughter was killed — a woman developed mental problems. At the time of the accident she was two miles away but was later told of the accident and saw the patients in hospital in distressed conditions. On these facts the Court of Appeal found that her mental state was a reasonably foreseeable consequence of the defendant's negligence, but held as a matter of policy that the Courts would not impose a duty of care on a negligent defendant beyond that owed to persons at or near the scene of the accident at or near the time it occurred. Stephenson LJ observed at p 820 that limits on claims must be imposed, and cited from his own judgment in *Lambert v Lewis* [1980] 1 All ER 978 where he said (at p 1006):

> There comes a point where the logical extension of the boundaries of duty and damage is halted by the barrier of commercial sense and practical convenience.

As in the law of tort, so in the Accident Compensation Act, there must be limits to mental injury claims. These limits may be fixed by reference to policy considerations, that is by having regard to the general purpose of the Act to provide a scheme of compensation for personal injury by *accident* but not for injury from *illness or disease*. This policy was recommended by the Woodhouse Commission (see para 289 of the Report) and is reflected in the legislation. The Royal Commission has noted that no system of compensation is able to avoid all the "hard" cases, and also that the issue of drawing a line between injury by accident and injury by sickness or disease is a mixed question of law and medicine. In drawing the line in a particular "hard case" the adjudicator can do no more than make a finding of fact on the causative influences of accident and/or disease, and then, as a matter of interpretation of the policy of the Act, decide whether the claimant should be granted cover.

Summary

1 The inclusion of the words "mental consequences" in the definition of personal injury by accident is designed to give cover under the Act for a mental disability which is produced by some unexpected mishap having the character of an "accident".

2 Mental troubles which can be related to organic damage caused by an accident clearly come under the cover of the Act. Those which manifest themselves shortly after an accident of a serious nature may usually be regarded as being consequent upon the accident, even if there is no obvious organic cause (eg a psychiatric illness).

3 However, after minor accidents, or those in which the claimant was not physically involved, or in cases where the claimant has a history of mental illness, the inference may not easily be drawn that the mental disability claimed for is caused by the accident. In such claims, the quality of the expert medical evidence will be significant.

4 In the light of such cases as *Mount Isa Mines Ltd v Pusey*, claims by a person not physically damaged by an accident, but so emotionally and physically close to such an event that he develops some mental aberration, will be sustainable, provided that the evidence establishes a satisfactory link between accident and disability. However, it is unlikely that nervous shock resulting simply from hearing disturbing news about an accident could be the foundation of a claim.

5 Borderline cases (eg those referred to in para 3 supra) may have to be decided by "policy considerations", that is, by the Corporation deciding in the light of the philosophy and purpose of the Act as expressed in the statute how far it can go in a particular case in granting cover for a disease or aberration of the mind.

Deducting wages of striking workers

A J Geare

In this article the author, a Senior Lecturer in the Department of Management in the Commerce Faculty, University of Otago, discusses in the light of some recent cases the legality of adjusting wages as a result of strike action.

Statutory provision

THE *Wages Protection Act 1964* does to some extent clarify the uncertain position of the common law in New Zealand with regard to employers' rights to make deductions from wages as opposed to the employees' rights to receive wages.

The Act provides in s 4(1) that

> Except as otherwise provided in this Act, the entire amount of wages payable to any worker shall be paid to the worker in money when they become payable.

The Act earlier defines what is meant by "money", and what is meant by "wages", but does not define what is meant by "payable". As will be discussed later, this omission creates considerable difficulties.

Section 7(1) does allow for deductions from wages payable by providing that

> any employer may with the consent in writing of the worker make deductions for any lawful purpose from wages payable to the worker.

Further grounds for deductions are allowed for by s 11, under which the Act

> shall be read subject to the provisions of any other Act; and nothing in this Act shall derogate from or make it unlawful to comply with any provision of any award, industrial agreement, or like agreement, or of any order of any Court or Tribunal.

Award provision

Thus, so long as the award or agreement stipulates that deductions may be made, there is no dispute as to their legality, and in practice it is immaterial whether the amount taken from the wage was in fact a subtraction *giving* the true amount of wages payable or a deduction *from* wages payable. As a consequence, most awards and collective agreements contain a clause allowing the employer to make

> a rateable deduction from the weekly wage for time lost through the worker's own default, sickness or accident or at the worker's own request.

However, when there is no "rateable deductions" clause, the lack of a definition of what is meant by "payable" creates an acute problem, particularly when the contract of employment is on a weekly or longer basis. There is a considerable degree of dispute and uncertainty as to whether the reduction in wages is a legitimate subtraction or an illegal deduction from wages payable.

Two New Zealand cases

Smith v Attorney-General [1974] 2 NZLR 225 established that s 4(1) of the Wages Protection Act 1964 ensures that when there has been an overpayment in one period no deductions may be made in a subsequent period. The decision was by no means clear-cut in that it was a majority decision of the Court of Appeal reversing a Supreme Court decision. Wild CJ in his dissenting judgement stated (p 229) that the change in wording in the Act from: "wages earned by or payable to" to: "wages payable to" recognises that

> wages "earned" may not always be "payable". It encompasses the case where for some reason there has been an overpayment for one period requiring correction by withholding portion of the earnings for the next period.

In this particular case the overpayment had occurred because Smith, after having been granted an allowance, was classified in a class which was not entitled to the allowance.

A later case was somewhat more applicable to the question of the legality of making deductions from wages as a consequence of strike action. *McClenaghan v Bank of New Zealand* [1978] 2 NZLR 528 again confirmed that employers cannot make deductions from wages in one period merely because they had overpaid their employees in an earlier period. In this case bank officers had gone on strike for two days, but had been paid in full for the fortnight in which the strike had occurred — because wages and salaries were paid by computer and the Bank felt it was impossible to adjust the programme in time. The Bank then deducted two days pay in the following fortnight — without an authorising letter from employees or the benefit of a deductions clause in the award. Chilwell J found against the Bank of New Zealand and stated (p 539)

> Each employee had in fact fully performed his contract of service in the fortnight in question. So there could be no justification for any adjustment downwards due to any breach of contract on the part of the employee during that fortnight because there was none.

A more complex issue is whether, in the absence of a rateable deductions clause, an employer is bound to pay a full weekly or fortnightly wage or

salary to a worker who is on strike for part or all of the period, but who has not had his contract of employment terminated.

It is submitted that the mythical "reasonable man", a non-lawyer, would consider it to be self-evident that workers who go on strike do not have any *right* to be paid for the strike period — whatever the union may persuade the employer to agree to as part of the settlement. It is also submitted that the "reasonable man" would not envisage a union contemplating taking such a case to Court. In fact a union secretary did contemplate taking such an action and, as will be discussed, part of the decision given by Chilwell J, although it is submitted it was obiter, was favourable to the union taking such action.

An inchoate case

The background to the contemplated action was a strike by labourers employed by the Dunedin City Council. The strike, which arose from the refusal of the employers to negotiate over wage rates, began on 19 July 1978 and ended on 20 August, when negotiations recommenced in conciliation.

Shortly after the strike ended, it was reported[1] that the secretary of the Labourers Union was intending to push for an independent disputes committee to be set up to decide whether the workers could recover the wages lost during the strike. The grounds for recovery were that there was no "rateable deductions" clause in the agreement.

The employers disputed the right on the grounds that the union withdrew its labour. The regional director of the Employers Association stated that the union's attempt would fail, although he conceded that it was a complex legal issue and his view, reportedly, was based simply on the fact that "he could not envisage the Court allowing men to be paid for work they had not done."

The case did not proceed, presumably at least partly due to legal advice to the union suggesting their case would fail. Shortly afterwards the present writer, in a brief discussion of the case, concluded that, on the basis of common law, if the union secretary "had gone ahead with the case he would have lost."[2] This view seemed to be supported by the leading New Zealand industrial law texts of the day.

Mathieson stated that "common law will be invoked when no award or agreement affects a worker's employment, or the award or agreement is silent."[3]

His interpretation of the common law, based on a number of cases, was (p 418) that

> the consideration for the payment of wages may be *either* the actual performance of work by the employee *or* his readiness and willingness to serve his employer, if of ability to do so. . . . If the latter is the proper construction the Court must ask itself whether the employee remained ready and willing to work . . . if (he did) not, no wages will be payable on the ground of total failure of consideration.

Workers who are on strike are clearly neither ready nor willing to work and hence have no wages "payable" to them for the duration of the strike. Employers who do not pay them for the period are simply calculating accurately the true amount payable — and are not making a deduction from wages payable.

Dr Szakats' view

Dr Szakats, when considering the Wages Protection Act 1964 observed, in the first edition of his text, that

> It is to be noted that "deductions" can only be made from "wages payable". If in the process of calculating the wages it appears that the employee worked for only part of the pay period, subtraction of wages for the hours missed will not amount to "deductions" as they are not "wages payable."[4]

This clearly supports the view that common law and statutory law considerations do not require employers to pay workers while they are on strike.

The author retained the above passage in the second edition of his text,[5] but took up a different, and, it is submitted, contradictory stance as well. He there states (p 168)

> Where an employee is absent from work without leave the employer may regard this conduct as a breach of contract and either dismiss the worker or affirm the contract and sue the worker for damages. Where the contract is silent on this point it is impossible to imply a term that the employer can make adjustments in the employee's pay for days not worked, as there is no such common law principle.

Dr Szakats does not comment on the apparently contradictory nature of his two positions — which appear on opposite pages.

If his second quoted stance is correct, then it strongly suggests that the labourers' union would have had a very good case. Since the City Council had not terminated the labourers' contracts of employment, the Council could well have been forced to pay the workers for the period they were on strike. Of course the Council would then have sued the workers for damages for breach of contract and presumably would have received approximately the same amount back — leaving only the legal fraternity as overall winners. If the Council was obliged to sue each worker individually, there would obviously be a mammoth waste of time and effort.

Dr Szakats does not indicate how he arrives at his second stance, and he takes a very similar position in the annotations to the Wages Protection Act 1964 in the 1980 edition of *Mazengarb,*[6] which is edited by him. His phraseology, particularly in the annotations, is very similar to that used by Chilwell J in his decision in the quoted case of *McClenaghan v Bank of New Zealand* and it seems reasonable to assume that Dr Szakats is using Chilwell J as his authority. Thus the soundness of his position is largely dependent on the soundness of those obiter parts of Chilwell J's decision with respect to the legality of withholding a portion of the wage in response to strike action during that period.

Chilwell J's views

As discussed earlier, *McClenaghan v Bank of New Zealand* was concerned with the legality or otherwise of making a deduction in one period in response to strike action in an earlier period. Chilwell J, held (with respect, quite correctly) that such deductions are illegal.

However Chilwell J also addressed himself to the hypothetical question of whether it would have been legal for th Bank of New Zealand, had it overcome the problems of computerised payments, to adjust the workers' pay in the actual period the strike took place and not pay them for the two days they were on strike. In an obiter part of his judgement, Chilwell J stated, (p 528) "the adjustment in fact would have been wrongfully made had it been made in the first fortnight" as, in his opinion, (pp 438-439),

> There is nothing in the contract, nor do I consider that there is any common law principle, which renders it competent for the employer to refuse to pay for days not worked. His choice is repudiation (that is, by dismissal) or action for damages for breach.

It is of course somewhat trite to observe that if in fact the case *had* been on the legality of making adjustments to wages in the actual period the strike had occurred, Chilwell J might have found very differently, as counsel would have been using totally different argument. There were in fact a number of New Zealand cases directly relevant to the question which were not referred to at all in the judgment. If they had been considered Chilwell J's views on the common law might have been different. This highlights the very good sense of Jamieson J in emphasising that

> It is a sound rule that the Court, in deciding a case, should confine itself to the issues which have to be settled in order to decide the matter.[7]

It is respectfully submitted that in fact the common law is that an employer is not obliged to pay workers who are on strike, whether or not there is a rateable deductions clause in the award. This is because the wages that would otherwise have been paid to the workers are not "payable" and hence the adjustment to the wages is a legal adjustment *giving* wages payable, and is not an illegal (with respect to the Wages Protection Act 1964) deduction *from* wages payable.

Arbitration Court views

It is in fact a widely accepted principle in New Zealand that wages are not payable to workers on strike, and this principle has been expounded in recent years in a number of cases. Blair J noted that the right to a minimum weekly wage is not an absolute one in that it may be qualified by a rateable deductions clause and by the fact that

> There is also the principle that employers are not liable to pay workers for periods during which they are not working when the employer cannot be held responsible for the state of affairs.[8]

Hence, Blair J found that

> It follows that the workers cannot found a claim for payment of wages for a period during which they were not working; such a state of affairs having been caused by their own actions.

The principle was also expounded by Blair J two years later in *New Zealand Engineering etc IUW v Shortland Freezing Co Ltd* [1970] 1 NZLR 326, 333:

> Workers cannot base a claim for wages for loss of working time when the facts establish that the loss of working time arose directly from the state of affairs which they themselves had created . . . we hold that a party to a contract who has himself repudiated such contract cannot claim under the contract for an injury resulting from the repudiation.

The Chief Judge of the Arbitration Court considered a similar case in 1978 and found that the 1971 judgment of Blair J quoted above was "applicable to the present case".[9] Jamieson J went on to express the view that

> We in any event see no statutory bar to the Court approaching the case under s 47(4) of the Act, ie in accordance with equity and good conscience. He who seeks equity must come with clean hands, and the Union and its members cannot claim to have clean hands in this matter.

Many cases[10] have emphasised that

> The right to wages depends upon whether the consideration therefor has been perform . . . it must be ascertained from the contract whether the consideration for the payment of wages is the actual performance of the work, or whether the mere readiness and willingness, if of ability to do so, is the consideration.[11]

These cases have been concerned with the question of whether wages are to be paid to a worker who is absent through sickness, but obviously the principle is equally applicable to a worker who is absent because he is on strike. Equally obviously, a worker who is on strike has neither performed the work nor demonstrated that he is ready and willing to work.

English cases

Employers may of course choose to terminate the contracts of service of workers who are on strike. If this occurs, there is no contract in existence and hence no right to wages. In most cases employers do not terminate the contracts and in this situation there is no unanimity as to the effect of the strike on the contract. In the case of *Morgan v Fry* [1968] 2 QB 710 all three of the Appeal Court Judges suggested a different consequence. Lord Denning MR stated (p 728).

> If a strike takes place, the contract of employment is not terminated. It is suspended during the strike; and revives again when the strike is over.

If the contract is suspended for a period, then wages would not be payable for the period the contract ceases to be in existence. Davies LJ considered (p 731) that a strike "In a sense . . . does amount to a termination of the existing contract". This view, which clearly rules against the need to pay wages, is however extreme, and the opinion of Russell LJ (p 734) that a strike results "in a breach of the contract" is by the far the most usual. Even if this last view is correct, common law — as discussed earlier — favours the view that wages are not payable. As Lord Denning MR observed in *Secretary of State for Employment v ASLEF* [1972] 1 CR 19, 56 "the breach goes to the whole of the consideration."

Finally it may also be assumed that it is implied in every contract of service that wages will not be paid if workers are on strike. Scrutton LJ expounded in *Reigate v Union Manufacturing Co* [1918] 1 KB 592, 605 the requirement for a term to be considered to be implied in a contract.

> A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is if it is such a term that it can be confidently be said that if at the time the contract was being negotiated someone had said to the parties, "What will happen in such a case?" they would both have replied "Of course so and so will happen, we did not trouble to say that; it is too clear."

Clearly any employer asked if he was anticipating being able to withold wages if the workforce went on strike would say, "Of course", (possibly using stronger terms). Likewise, a union secretary asked if he expected his members to lose pay if they went on strike would also say "Of course" — unless his tongue was almost through

his cheek. In practice workers expect to lose pay if they go on strike and employers expect to withhold pay. As Mackinnon LJ stated in *Orman v Saville Sportswear Ltd* [1960] All ER 105, 111:

> [an] employer remains liable to continue paying so long as the contract is not determined by proper notice, except where a condition to the contrary can properly be inferred from all the facts and the evidence in the case.

Common practice to a large degree determines what may be inferred. This was found in *Hart v Riversdale Mill Co Ltd* [1928] 1 KB 196 where it was pointed out that

> The case finds that deductions for bad work are and have been for many years the usage and custom in the cotton weaving trade in Lancashire, and have always been and are an incident of the weavers' contract of service; and have always been and are taken into account in calculating the correct wages.

Similarly it is usage and custom that workers on strike are not paid.

Conclusion

To conclude, it is respectfully submitted that, Chilwell J and Professor Szakats notwithstanding, wages are not payable under common law to workers who are on strike. However, to avoid dispute it would clearly be in the interests of employers to include a rateable deductions clause in their awards and agreements. It would also be of benefit if the Wages Protection Act 1964 clearly defined what is meant by the word "payable". Although Chilwell J considers ([1978] 2 NZLR 541), "The word is perfectly plain. It means a sum that is to be paid, that is, due", there are a number of at least reasonably valid alternative constructions. Defining "payable" as "due" is more than somewhat circular, since "due" is defined by the *Concise Oxford Dictionary* as "payable" or "debt or obligation". This leaves open the original dispute as to whether overpayments can be deducted. The confusion that results from personal indecisive definitions is highlighted by the fact that Chilwell J quoted, accepted as binding, and used to support his notion of "payable" the statement by McCarthy P in *Smith's* case ([1974] 2 NZLR, at 232), that "If wages are earned, they are payable unless some right exists in the employer to withhold them". However the logical inference from the above statement is that if wages have not been earned they are not payable. It is surprising, considering the amount of statutory law in force in New Zealand with respect to industrial relations, that these questions are left to common law.

We invited Dr Szakats to comment on those parts of the article which relate to his own works, and we publish his response below:

The Editor has invited me to comment on that part of the above article which draws attention to certain "apparently contradictory" passages in my book, *Introduction to the Law of Employment*. It refers to p 169 of the second edition (also in the first edition (p 149)) where I point out the distinction between "deductions" from "wages payable" under the Wages Protection Act 1964 and "substraction" meaning the process of calculation whereby, pursuant to the contract due to special circumstances certain amounts do not form part of the wages payable. From a strictly legal point of view this distinction is very important, though I agree with the author that as far as the worker is concerned it simply means less money received.

The second statement quoted from p 168 of the second edition, instead of contradicting the other one, in my view emphasises the distinction. It has to be read in the context of the Wages Protection Act and *McClenaghan's* case. As the author observes, it is merely a paraphrase of dicta by Chilwell J on pp 538-9 of the judgment, frequently using the same words. The passage quoted continues: "Once it has been established upon the true construction of the contract what is 'the entire amount of wages payable', there is no difficulty in applying s 4(1) of the Act. So was held in *McClenaghan & Ors* . . . etc". These further parts, however, are omitted from the article. Thus, the quote does not convey the true effect of the whole paragraph, which points back to the construction of the employment contract. Are wages to be paid only for hours actually worked? Or is there a contract for weekly, monthly or annual remuneration? Is there a provision in the contract entitling the employer to withhold payment for time not actually worked? If so, amounts withheld are not "wages payable." The question of deduction does not arise. Even though the dicta of Chilwell J in this respect may be obiter only and not part of the ratio decidendi, and hence do not bind a Court in a subsequent case, they certainly must be regarded as carefully considered statements of law carrying substantial weight and authority.

Thequestion whether or not wages are deductible, or more correctly "not payable", for a period of strike should be examined not in the context of the Wages Protection Act as deductions, but in conjunction with breach of contract, which is a matter for common law. If participation in the strike amounts to a repudiatory breach on the side of the worker, it entitles the employer to rescind the contract, in other words to dismiss the worker. The employer may, nevertheless, instead of terminating it merely suspend the operation of the contract. In both cases the employer's duty to pay wages comes to an end when the repudiation occurs. After the strike eventually is settled, in the first case new employment contracts will be entered into, while in the second case the former ones, usually with some variations, revive. Admittedly the workers would not notice any difference between the two situations. Not even employers always appreciate this difference.

If the repudiatory breach has not been countered by dismissal or suspension, then the employer is deemed to have overlooked the breach and to regard the contract as still subsisting. In such circumstances the terms of the contract govern whether or not wages are payable. (See paras 218, 219 and 225 of *Employment*, 2nd ed.)

It can be seen therefore that Mr Geare's criticism is based on a misinterpretation of the parts quoted and the relevant principles, leading to an over-simplification of the issues. In practice from the wage earner's point of view it may be immaterial to draw a distinction between deduction and subtraction, but without ascertaining on the basis of the contract and common law what are the "wages payable" the Wages Protection Act itself cannot be correctly construed and applied.

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1 *Otago Daily Times*, 7 September 1978

2 A J Geare, *New Zealand Industrial Relations: Legislation and Practice*, Campbell & James, Dunedin 1979, p 139

3 D L Mathieson, *Industrial Law In New Zealand*, Sweet & Maxwell, Wellington 1970, p 410
4 A Szakats, *Introduction to the Law of Employment* (1st ed), Butterworths, Wellington 1975, p 149
5 A Szakats, *Introduction to the Law of Employment* (2nd ed), Butterworths, Wellington, 1981, p 169
6 A Szakats (Consulting Editor), *Mazengarb and Smith's Industrial Relations and Industrial Law* (4th ed), Butterworths, Wellington, 1980, p 461
7 *Shell Oil NZ Ltd v Canterbury General Drivers etc IUW* (1978) Arb Ct 111 at p 114
8 New Zealand (except Westland) Freezing Workers Appeal (1971) BA 586 at p 589
9 *New Zealand Steel Ltd Employees* [1978] Arb Ct 131, 135
10 *Petrie v Mac Fisheries Ltd* [1940] 1 KB 258; *O'Grady v M Saper Ltd* [1940] 2 KB 469; *In re Rutter and JJ Craig Ltd* [1944] NZLR 444
11 *Martha Goldmining Co Ltd v Inspector of Awards* [1942] NZLR 335, 343

THE NEW ZEALAND LAW JOURNAL

CORRESPONDENCE

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

Dear Sir

In his paper on Accident Compensation, published in your Journal of December 1981, Mr G W R Palmer reaches a number of idealistic conclusions with which I, as a former New Zealand practitioner, would not agree. There being no space here to debate these, I draw nevertheless the attention of your readers to one preliminary conclusion reached by Mr Palmer which I suggest is quite untenable.

In the introduction to his paper, Mr Palmer rejects any criticism of the Accident Compensation scheme as unduly costly to the community, and puts forward as a comparison the level of insurance premium levied on wages in New South Wales to cover industrial accidents as representing (he says) a much higher cost level than the levies imposed on employers in New Zealand by the Accident Compensation Corporation. As a New South Wales practitioner, I would point out three very real distinctions between the different costs referred to by Mr Palmer:

1 The awards of damages reached by judgment or settlement in this State are made up of arithmetical projections of future income loss with only a discount of 3 percent by way of an investment allowance, and with no adjustments to cover the vicissitudes of life. This manner of calculation provides awards to plaintiffs at a very high level, sometimes running into millions of dollars, which are grossly above those which would have been paid under the previous common law system in New Zealand. Were that system still in force, it would not have provided for the arithmetical projection which makes the New South Wales costs so high, and the validity of Mr Palmer's comparison loses much of its strength.
2 Mr Palmer does not mention the fact that public hospital costs in New Zealand arising from accidents are still met out of the health vote, and are not included in the benefits paid by the Accident Compensation Corporation. In New South Wales, however, those hospital costs are paid as items of special damage which are included in each settlement or award (as they used to be in New Zealand). Again this factor would make the true New Zealand level of cost to the community much higher than Mr Palmer quotes.
3 Employers in New Zealand pay the loss of wages to accident victims off work for the first two weeks. It was the realisation that these initial costs formed such a subtantial proportion of the total compensation benefits that brought the Government to extend the liability of employers to the second week as well. This circumstance of course serves to keep the New Zealand cost level of Accident Compensation down yet again, since New South Wales payments are calculated by the Courts from the date of the accident.

It is my submission that, once these three vital factors are taken into account, there is no longer any case to show that the New Zealand scheme costs are less than those of a common law scheme as at the present day. It is surely necessary for readers of Mr Palmer's paper to appreciate the full picture when comparisons such as his are drawn.

Yours faithfully

JOHN BURNS
Sydney, New South Wales

The startling reality and Ualesi: a rejoinder

Reprinted in view of the regrettable editorial errors that marred its appearance last month

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 than 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 unmistakeably 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.

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 McGee 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?

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 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.

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