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# A word from the editor

EDITORS come and go. The *Law Journal* rolls on. For 54 years it has been the profession's leading periodical. However permanent the *Law Journal* may seem as an institution, it has always assumed the hues and tones (and values) of its current editor. Last month, with a new editor, it became apparent that changes were afoot and it is appropriate now to inform readers what they can expect.

My first job on becoming editor was to canvass the views of many of our readers and contributors. While their opinions reflect the diversity of the profession, there is concensus that the *Law Journal* should be a periodical of general interest to all practitioners — informative, challenging, and amusing — with an emphasis on keeping the profession up to date. The suggestion is that this can be accomplished best by regular short features (acknowledging there is room for the comprehensive article).

My approach as editor is more neo-classical than modern. Inspiration comes from the past, and any long-time *Law Journal* reader will note that the so-called recent innovations are little more than restorations of previous features. Changes will be made gradually, on a step-by-step basis, guided both by *Law Journal* traditions and current subscriber needs. The process necessarily entails doing a lot of the writing myself until things are firmly established. To briefly outline what is in store:

- Features covering judicial and legislative trends.
- Features covering comings and goings in the profession.
- Features on areas of practical interest — Courts, office management, commercial/conveyancing.
- Items of general interest.
- By-line columns.

More detailed articles will supplement the features.

Would-be contributors are reminded that the academic style appropriate to an article on, say, commercial leases is not necessarily the best way of getting across information pertaining to other fields of practice. Those who wish to contribute news, opinions, or practical bits and pieces should contact the editor. Every attempt will be made from this end to put your information into a presentable format.

The *Law Journal* has had a tradition of opinionated editors. I see no reason to discontinue this practice. I hasten to add, however, that space will be made available — on the editorial page and elsewhere — for those who wish to take issue with what is said on these pages.

Finally, some brief acknowledgements: to the Butterworths' production department for their patience in accommodating a new editor. I need not bore you with the details — suffice to say from typist to typesetter, through proofing to layout they have been fantastic. And last but not least my deep gratitude to Tony Black, both for his previous contributions to the *Law Journal* and for his act of faith in me.

# The Law Society and public opinion

THOSE who peruse the Parliamentary debates on the Law Practitioners Bill (featured inside) will note a clear divergence of opinion on several important matters between the Select Committee that looked into the Bill and the Law Society that sponsored it. It is not necessary at this stage to interpret events in a "sky is falling" frame of mind. One merely has to note that the arena of public opinion is a most difficult tribunal, and arguments that seem credible to their authors are all too often seen in an entirely different light by others. Accordingly, responsibility for disruption to best laid plans lie in the hands of the body that fails to communicate its point of view rather than in those who fail to grasp it. I had the pleasure of observing the Law Society in action before the Select Committee. Their advocacy did not exactly take one's breath away.

It is out of place here to criticise without being constructive. The Law Society's initiative in seeking new participants in their affairs is a step in the right direction. So too is the fresh and open approach of its new president, Mr Bruce Slane. Hopefully, a lesson will have been learnt, and the mistakes of the immediate past will not be repeated.

On a final note, it can be said that that great deity, "the public interest" to which we all pay tribute, is as elusive as the abominable snowman. Sightings have been claimed at the television studios in Avalon, in the corridors of the Consumer Institute, and on the pages of this publication. The most far-fetched claim, however, is that the public interest can be found at Waring Taylor Street. Hopefully, this notion can be abandoned, and the profession can begin doing what lawyers are good at — showing an appreciation for the other party's point of view coupled with forceful argument of one's own.

**John McManamy**

# Case and Comment

## Sale of land — nomination and land acquisition

THE judgment of Prichard J delivered in the Hamilton High Court on 1 June 1982 in *Townend v Hurrell & Toby Property Limited* (M15/82) will be greeted with pleasure by those who have to do with the sale and purchase of rural properties and must face the perils of the Land Settlement Promotion and Land Acquisition Act 1952 — a definite candidate for the prize for the most ill-drafted statute on the books. In simplified form the facts were commonplace. The contract related to a farm property and described the purchaser as "John Douglas Hurrell or nominee". It contained a clause by which Hurrell remained personally bound by the provisions of the agreement "as fully and effectually as if he were the contracting party on his own behalf" if he failed to make a nomination or if his nominee failed to complete the purchase. The contract was expressed to be conditional upon the consent under the Act being obtained by 18 December 1981.

Before that date Hurrell, who owned personally other farm land, executed a deed of nomination in favour of Toby Property Limited, on whose behalf a purchaser's declaration under s 24 was completed and filed within one month of the date of the contract. No application was made for consent to a sale to Hurrell himself.

Settlement was due on 1 May 1982 but before that date Hurrell took steps which were held to amount to a repudiation.

The vendor's advisers acted very promptly. They issued and served on Hurrell and the company a Writ of Summons seeking an order for specific performance and moved for an order under R 250B of the Code of Civil Procedure seeking a priority fixture and a firm date for the action to be heard. They were successful in obtaining a hearing on 24 and 25 May 1982 and judgment was delivered a week later, exactly one month after the date fixed for settlement. (Apparently as a matter of caution the vendor's solicitors had forwarded a Settlement Notice pursuant to cl 8.0 of the Auckland District Law Society's new agreement form on 3 May 1982.)

Prichard J had little difficulty in coming to the conclusion that the contract remained on foot between the vendor and Hurrell despite the nomination. The clause purporting to give a right of nomination was, like the addition of the words "or nominee" to the description of the purchaser, merely declaratory of the normal incidents of an agreement for sale and purchase.

Counsel for the defendants agreed with this conclusion and argued from it that the contract was illegal because Hurrell remained the purchaser and no consent under the Act existed in respect of him.

In what is perhaps the most significant ruling in his decision Prichard J held that, despite the continuing contractual relationship between the vendor and Hurrell, the nomination was legally effective in that the vendor was now bound to transfer the farm to the company. There was no longer any question of Hurrell acquiring the farm in addition to his present holding. "For the purposes of an Act designed to prevent undue aggregation of farm land I have no doubt that the company is the purchaser, and the only purchaser, with which the Act is concerned." And, "In my view, the Act is not concerned with the niceties of the law of contract — it is, as its short title says, concerned with the acquisition of land." The learned Judge pointed out that if the situation had been reversed and the contract had named "Toby Property Limited or nominee" as purchaser the interpretation contended for by the defendants would have provided a means of defeating the object of the legislation for Mr Hurrell, "a purchaser disguised as a nominee", would on that hypothesis have been able to acquire additional farm land without applying for consent.

The defendants also argued that the action was premature saying that, according to cl 8.0 of the contract, the vendor's right to sue for specific performance did not arise until 12 working days after service of a Settlement Notice. The notice given would have expired on 20 May 1982. The writ was issued before that date and, indeed, before the date fixed for settlement by the agreement. However, Prichard J held that the defendants had committed an anticipatory breach by repudiating the contract before the date for completion, which gave the plaintiff an immediate right to sue for specific performance. Clause 8.0 did not then apply. In other words, the vendor was suing under the general law rather than under the clause.

Some readers may now be wondering how an order for specific performance could be made against a person (Hurrell) who was prevented by the Act from becoming the purchaser of the farm or against a company which was not in a contractual relationship with the vendor. Prichard J found a delightfully simple solution for this dilemma by ordering Hurrell specifically to perform the agreement by paying to the vendor the amount required on settlement and accepting from the vendor a transfer to Toby Property Limited.

Two complicating factors have been omitted from the account of the facts given above. The first was an undertaking given by the vendor to the Local Authority that he would not sell the house site on the farm separately from the farm proper. Hurrell's nomination extended only to the farm and not to the house. The learned Judge

found that the covenant did not affect the title nor did it bind successors in title nor had any action been taken by the Council to restrain the transaction. It was doubtful whether the Council could have prevented it. He therefore found that the existence of the covenant did not preclude specific performance.

The second matter was the existence of a registered lease over the title to the house site in favour of the vendor's mother. The defendants argued, apparently rather faintly, that the vendor was, by reason of the lease, unwilling or unable to perform the agreement on the day fixed for settlement. The defence had not been pleaded. Prichard J pointed out that it was not the practice of the Court of Chancery to determine questions of title on the hearing of an action for specific performance unless the alleged defect was prominently put forward in the pleadings. In cases of doubt the usual procedure was for a direction that there be an inquiry as to title or a conditional order. He held that the course of making an order for specific performance subject to an appropriate inquiry as to title or conditional on proof of title, is still available in New Zealand though it may not be common practice here, no doubt for the reason that under the Land Transfer system there are seldom difficulties in proving title. The order which he made was conditional upon the plaintiff obtaining and registering a surrender of the Memorandum of Lease.

**Peter Blanchard**

## Protecting the coastal environment

SECTION 3(1)(c) of the Town and Country Planning Act 1977 specifies as a matter of public importance "the preservation of the natural character of the coastal environment" and its protection "from unnecessary subdivision and development".

Two Divisions of the Planning Tribunal have recently, within a week of each other, been required to apply the section, and in particular to interpret the expression "unnecessary subdivision and development".

(1) *Physical Environment Association of the Coromandel (Inc) v Thames-Coromandel District* (Number One Division Appeal 525/81, 10 June 1982.)

This was an appeal by a local environmental society in effect against a proposed scheme change which would have permitted residential subdivision at Hereheretaunga Point, behind Hahei Beach, to provide 20 holiday homes. Although the development had been carefully planned to harmonise as far as possible with its background, and to be as unobtrusive as possible, the Tribunal found that it represented a significant intrusion into a scenic area otherwise remaining in its natural state. There was other appropriately zoned land in the vicinity as yet undeveloped. Hence, though undoubtedly there was *demand* for sections, this was not synonymous with *need*, and the subdivision must be regarded as "unnecessary" in terms of s 3(1)(c).

The Tribunal noted that the scheme plan incorporated wording similar to s 3(1)(c) in its statement relating to the coastal zone. However, the scheme went on to make provision for certain exceptions in cases where particular conditions were fulfilled. This development had been encouraged by the council on that basis. The Tribunal reminded the council that provisions of this kind could lead to disappointment, since no gloss on the statutory requirements which the council might include in its scheme could override those requirements.

(2) *Harward v Waimea County* (Number Three Division, Appeal 613/81, 15 June 1982.)

This appeal was against consent to a specified departure which would permit Radio Rhema to locate a 66m high transmitting aerial mast, with an ancillary building, on an area of former tidal flats between the Nelson Boulder Bank and the State Highway, some 7 miles north of Nelson.

The Tribunal found that the area was a coastal environment worthy of recognition and protection in terms of s 3(1)(c). Though the proposal was not a subdivision it did amount to a "development". The crunch question was, as it had been for the Number One Division in the earlier case, whether the visual intrusion that the proposal would admittedly involve was so material as to import the protection of s 3(1)(c); and, if so, whether such an intrusion was "unnecessary".

The Tribunal commented, "an evaluation must take place . . . . In the end it becomes a matter of degree." The Tribunal finally concluded that the impact would not be substantial; and, though rejecting a submission that the proposal constituted a public service, that the development was not "unnecessary". It was "highly desirable" and "not a luxury" for the aerial to be placed in this locality. There was evidence that the applicant had looked in vain for an equally suitable site in the locality. The appeal was accordingly dismissed.

### Conclusions

In cases of this kind the degree to which the particular coastal environment merits protection is the first question, and the answer will depend on essentially a value judgment by the Tribunal in the light of the evidence and, as in both these cases, a personal inspection of the site by the members of the Tribunal. It may be significant that in the Nelson case the Tribunal heard evidence from contending landscape architects, and showed a distinct preference for the evidence of the expert called by the applicant. Indeed the inference is that this factor may have been decisive.

The second factor relates to the degree of necessity for the development. Again it is a matter of evaluation. The existence nearby of land available for comparable development was a significant factor in the *Coromandel* decision.

In the Nelson case the appeal site was in the Rural A Zone, whereas in the Coromandel case it was in a specially created Coastal Zone. However, this difference does not appear to have been significant.

**Peter Haig**

## Sovereign immunity

IN *Marine SteeL Ltd v The Government of the Marshall Islands* (High Court, Auckland, 29 July 1981 (A553/81)), Mr Justice Barker granted leave to the plaintiff on its *ex parte* application, to serve the defendants outside of New Zealand with a notice of writ under R 51A and a statement of claim. Plaintiff was a ship repairer, carrying on business in Auckland. The suit was on a contract with the government of the Marshall Islands to be performed wholly in New Zealand.

Mr Justice Barker rejected the defence of sovereign immunity primarily on the ground that the Marshall Islands have not yet achieved the status of a sovereign state although

he indicated that his holding was provisional and that further information could alter his view, (the case is discussed in [1981] NZLJ 505). He also canvassed recent developments in the law of sovereign immunity in the UK Courts and the Privy Council although, in view of his holding that the Marshall Islands government could not claim sovereign immunity, his remarks on the subject appeared to be obiter.

*Marine Steel Ltd v Government of the Marshall Islands (No 2)* (High Court, Auckland, 15 March 1982 (A553/81)) involved a motion by defendant for an order rescinding the above order on the grounds:

(a) that the order was obtained on an incomplete and misleading presentation of the facts;
(b) having regard to the amount in dispute and to the existence in the place of residence of the defendant of a Court, having jurisdiction, and of the comparative cost of proceeding in New Zealand as compared with the Marshall Islands, the Court's discretion ought to be exercised in favour of hearing it in the Marshall Islands.

But in determining whether it would be more convenient to have the matter litigated in New Zealand or the Marshall Islands, the existence of a Court in the Marshall Islands is only one of the many factors to be considered. The case concerned a contract to repair a ship which was executed by the plaintiff wholly in New Zealand. Because the claim was a dispute over the cost of ship repairs which were wholly undertaken in New Zealand, Mr Justice Barker felt that it would still be more convenient to have the matter litigated in New Zealand.

His Honour then turned to counsel's submission that plaintiff should have obtained a certificate from the Minister of Foreign Affairs as to the status of the Marshall Islands in the eyes of the government of New Zealand. In reply counsel for plaintiff produced a letter from the Minister of Foreign Affairs which did not specifically answer the question, "how does New Zealand recognise the government of the Marshall Islands?" but which, in Mr Justice Barker's view, made it sufficiently clear that the answer to that question would have been, "that the Marshall Islands is a trust territory of the United Nations administered by the United States."

Mr Justice Barker further concluded, on the basis of a study of United States cases not cited in the judgment, that the United States does not regard itself as the sovereign power but merely as the administrator or guardian of the Islands until independence came.

With respect, if the United States is not the sovereign authority and the government of the Marshall Islands is not the sovereign authority, there would be a vacuum of the type which is known in international law only in the case of territory which is *res nullius* (uninhabited and unclaimed). In the case of inhabited territory there must be some sovereign who will assume rights and duties for that territory under international law.

The territory is administered by administering power pursuant to a Trusteeship Agreement which includes the terms under which the trust territory will be administered (UN Charter, Art 81).

Under Art 79 of the United Nations Charter the agreement is to be between "the States directly concerned". However there is nothing in Art 79 to help us to determine who these States are and, in practice, the administering authorities decide for themselves which States still receive draft agreements and which shall receive them for information purposes only. But it seems that the role of the General Assembly or the Security Council (in the case of "strategic areas" such as the Marshall Islands) is limited to mere approval of the agreement. Under Art 84 it is "the duty of the administering authority to ensure that the trust territory shall play its part in the maintenance of international peace and security". So it is clear that it is the administering authority, not the United Nations, that has responsibility for trust territories at international law.

It would seem that the case of *Carl Zeiss Stiftung v Raynor and Keeler Ltd* [1967] 1 AC 853 is applicable to the present case.

The *Carl Zeiss* case dealt with a company which was incorporated under the laws of the German Democratic Republic. At the time, the German Democratic Republic was not recognised as a sovereign state by the government of the United Kingdom. The House of Lords held that if the German Democratic Republic was not a sovereign state, then it was an instrumentality of the government of the USSR since it was part of the zone of occupation allocated to the USSR by the four power agreements of September 12, 1944 and July 26, 1945. As an instrumentality of the Soviet government, its Acts were none the less Acts of State which could not be treated as nullities by UK Courts.

Likewise, if the government of the Marshall Islands has not yet attained independence, it is still an instrumentality of the United States government and would seem to be entitled to sovereign immunity on that ground. It should be noted that the USSR considered the Federal Republic of Germany to be a sovereign state. It did not consider itself sovereign in the territory. Its views were not conclusive. Likewise the views of the United States Courts about whether it is sovereign in the Marshall Islands cannot be regarded as conclusive of the issue of sovereign immunity.

If the doctrine applies, it then becomes necessary to consider whether the acts complained of were acts *jure imperii* or acts *jure gestionii* under the new restrictive doctrine of sovereign immunity enunciated by the Privy Council in *The Philippean Admiral* [1977] AC 373 and by the House of Lords in *I Congreso del Partido* [1981] 2 All ER 1064.

**Jerome Elkind**

## Tax and Matrimonial Property

THE purpose of this note is to examine the implications of a recent High Court judgment in relation to the Inland Revenue Department's stated attitude to the operation of the Matrimonial Property Act 1976 and the Estate and Gift Duties Act 1968, the Stamp and Cheque Duties Act 1971, and the Income Tax Act 1976. The case concerns Bisson J's decision in *Van Doorne v CIR* (Hamilton 30 April 1982 (M308/81)) where it was demonstrated that the concept of beneficial ownership under the Matrimonial Property Act (where spouses are regarded primarily as equally sharing in matrimonial property) overlaps with the concept of individual ownership and resultant taxability under the taxing statutes. At present neither is a restful bedmate of the other.

The facts of the case are as follows. A farmer entered into a s 21 agreement with his wife (neither contemplating separation) whereby, for the purpose of contracting out of the Matrimonial

Property Act, division of property (legal title to which was owned by him) was to be recorded and in particular four-tenths of a certain farm property was to be transferred to his wife. The farmer died about one month after signing the agreement and executing a transfer of the four-tenths interest. The Department assessed estate duty on the transfer, as a gift within 3 years of death (s 10 of the Estate and Gift Duties Act).

Bisson J held that the farm property was matrimonial property and that forebearance by the wife of her rights to a half-interest under the Matrimonial Property Act was clearly valuable consideration, and indeed adequate consideration (in money or money's worth) had passed from the transferee to the transferor. That is, there was no gift, and further, no voluntary contract — a point faintly argued by the Department. The Court also rejected a submission by the Department that the agreement was not valid under s 21(1) because it did not relate to all of the spouses' property. The Court held that the agreement clearly may relate to something less than all the spouses' property or to the property of one of them.

The Court also commented that s 21(1) does not open the door for all estate planning schemes to avoid or reduce death duties. Where fully adequate consideration for a transfer of assets is not given, liability for estate duty arises where the transferor dies within three years. This is because by s 4(5) of the Matrimonial Property Act nothing in s 4 affects the law relating to the imposition, assessment and collection of estate duty.

It is worth contrasting this case with the decision of Savage J in *Re M* (High Court, Rotorua, 29 July 1980 (M125/78)), where it was held that because s 4 requires all other enactments to be read subject to it, and because the imposition of estate duty is expressly preserved and not stamp or gift duty, the rights under the Act are intended to override the latter imposts. This analysis is not accepted by the Department in relation to gift duty. Clearly, the Department will need to consider the extent of forebearance by the recipient spouse and decide whether or not it is an adequate consideration (Bisson J having decided that such forebearance is valuation consideration). In fact the Department is appealing the decision in *Van Doorne* and so the law remains unsettled. Depending on the type of agreement, the Department (and therefore the Taxation Review Authority or the High Court dealing with an objection to an assessment) is likely to have to decide what is or what is not matrimonial property under the Matrimonial Property Act.

Practitioners will be aware that shortly after the Matrimonial Property Act commenced, the Department, despite s 54, (duty exemption for "instruments" for the purposes of the Act) sought to charge conveyance duty on any transfer of property whether it was pursuant to a Court order, a separation agreement, or an "amicable" agreement pursuant to s 21 of the Act. The Department subsequently resiled from that position entirely. Furthermore, the Department for the purposes of estate and gift duty, will not seek to charge either estate or gift duty on a transfer pursuant to a Court order or a separation agreement. Nevertheless the Department's attitude is that a s 21 agreement between husband and wife in amicable circumstances is different, and a subsequent transfer is subject to an assessment certainly for estate duty and probably for gift duty.

The Department does not appear to be seeking to charge gift duty on the mere declaration of a husband and wife that certain assets are matrimonial property, despite the fact that such a declaration could amount, as between the spouses, to a disposition of property as defined by s 2(2) of the Estate and Gift Duties Act. Since legal and beneficial ownership of income producing assets largely determines which taxpayer spouse has derived assessable income for income tax purposes, it follows that an agreement pursuant to s 21 of the Matrimonial Property Act vesting legal ownership of an income producing asset in a spouse will cause the income to be derived by that spouse and not the former owner.

The Department considers that where there is a subsequent transfer then there is a gift in the absence of evidence of consideration passing from the transferee to the transferor. The type of evidence required apparently is the source of funds for the original acquisition, and such other contributions that may have been made to the value of the property by the transferee prior to transfer. It has been suggested that past consideration does not qualify, nevertheless.

Because the Matrimonial Property Act endorses the concept of conversion of a contribution of services into capital assets (a principle not at all inconsistent with general partnership law in any case), and because the taxing statutes require a far more formal record or delineation of any such conversion, clearly the conflict can only be resolved by adopting the approach that Savage J took in *Re M* (supra), until the Court of Appeal decides otherwise.

In any case, the concept of "gift" under the Estate and Gift Duties Act presupposes a lack of adequate consideration, whereas the Matrimonial Property Act primarily establishes that legal and beneficial ownership in at least half the matrimonial property can be claimed by the contribution of services. It would be an odd result if a spouse were entitled to a half-share in an asset (being matrimonial property) but simultaneously received a gift of that half-share. Possibly, a "gift" for duty purposes has quite a different character as a disposition of property, from either a declaration of "matrimonial property" or a transfer in exchange for forebearance to enforce matrimonial property rights. The distinction is difficult to detect.

In relation to the Income Tax Act, s 99 (the anti-avoidance section) presumably must be read subject to the Matrimonial Property Act 1976 because of the operation of s 4 of the latter. It would be astonishing if the Department successfully invoked s 99 against a s 21 agreement (ie spouses undertaking transactions which gave legal recognition to subsisting rights given them by the Matrimonial Property Act).

If the Inland Revenue Department is justified in detecting a difference for duty purposes between division of matrimonial property by Court order or separation agreement, and a s 21 "amicable" agreement, clearly legislation will follow if policy requires that spouses should be fiscally penalised for avoiding the expense of Court orders or separation.

**D W Gunson**

## Securities Commission — its powers

THE Court of Appeal's decision in *City Realties Ltd v The Securities Commission* (11 June 1982, CA179/82) is useful for its guidelines in relation to

the powers of the Commission under the Securities Act 1978:

The Securities Commission sought to investigate in depth an attempted company takeover by City Realties Ltd. The Commission issued a document containing its terms of reference for its investigation, and summonses were issued to City Realties and another company to give evidence and produce documents. Meetings involving the parties took place and a draft report setting out the views of the Chairman was circulated, but no further action was taken by the Commission. In the meantime, City Realties acquired 100 percent control over its target company.

City Realties began judicial review proceedings in the High Court during the course of the investigation and continued its appeal to the Court of Appeal as a test case. The appellant sought a declaration that the Commission was acting outside of its powers in undertaking its examination in the highly detailed way set out in its notice.

Cooke J, delivering judgment of the Court, felt inclined to set out the Act in outline: Part I establishes the Commission and makes general provisions concerning it. Part II, largely not in force, deals with the restrictions on the offer and allotment of securities to the public. It creates, inter alia, civil liability for misstatements by an expert in a prospectus. Other provisions relate to registration of a prospectus, and regulation of advertising (now in force). Provisions to come into force include suspension and cancellation of registration of prospectuses, Registrar's powers of inspection, and appeals from the Registrar to the Commission.

This case was concerned with the activities of the Commission under its general functions in Part I (which are not binding except for the purpose of requiring persons to give evidence and produce documents). Section 10 provides that the Commission's functions shall be:

(a) . . .
(b) To keep under review the law relating to bodies corporate, securities, and unincorporated issuers of securities, and to recommend to the Minister any changes thereto that it considers necessary; and
(c) To keep under review practices relating to securities, and to comment thereon to any appropriate body; and
(d) To promote public understanding of the law and practice relating to securities.

The appellants argued that because these provisions were framed in a general manner, the Act did not contemplate interference in specific takeover transactions. The Court, however, observed that both the legislature and the judiciary had difficulty in coping with the tactics involved in company takeovers, and that it was accordingly Parliament's intention to set up the Commission as a watchdog. In this role, the Commission was empowered to investigate the takeover at any stage (not merely after registration of the share transfer as was suggested). Because the Commission could make no binding orders under s 10, there was no interference with the Companies Amendment Act 1963 or with the Commerce Act 1975, and therefore there was no need to read down the legislation, especially since potential abuses on the part of the Commission could be controlled by rules of natural justice and by liability in negligence.

## Worth quoting

"THIS case like so many in this field is not one where the legal profession can be properly blackguarded by politicians and enforcement officers and for that matter judicial officers for taking technical points to avoid the conviction of the subject", *Perrot v MOT* (High Court Wellington. 9 June 1982 (M167/82). O'Regan J).

## Briefly noted

**Guardianship** — A child was born in November 1976. Subsequently in 1979 a paternity order was made. In 1980 the child was placed under the guardianship of the Court, and the mother was appointed the agent of the Court. Later in 1980 the father was sentenced to imprisonment for $3^1/_2$ years. The father then applied for a declaration that he was the guardian of the child, deposing that he wished to have access and a say in the upbringing of the child. The mother opposed the application on the ground that the existence of the wardship order excluded the rights and status of the natural guardian.

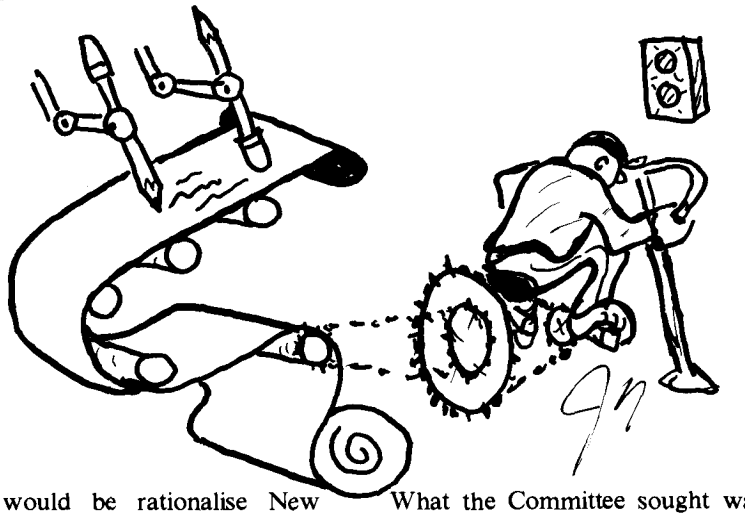
It was held that a wardship order does not necessarily extinguish existing rights of guardianship. There must be some positive act of deprivation of status rather than an incidental loss. *Re Tennant* (High Court, Wellington. 21 June 1982 (A12/81). Quilliam J). (To be reported in [1982] FLR.)

**Maintenance** — When the parties married in 1968 they were both over fifty years of age and had been previously married. They separated in 1972. In February 1974 a separation agreement was signed under which the wife was given sole possession of the home, the husband taking responsibility for the two mortgages and outgoings. In April 1974 a maintenance order was made in the wife's favour. The husband remarried in August 1976, and an order for the sale of the home and equal sharing of the proceeds was made in May 1977. The wife purchased the interest of the husband in the home. Later, in December 1977 the maintenance order was suspended on the basis that the husband continued to pay the outgoings. The wife applied for a variation of the order, pleading that her outgoings exceeded her income derived solely from her invalid's benefit. Against an order requiring the husband to pay maintenance at the rate of $18 per week, the husband appealed, contending that he was about to retire and his second wife was unable to work.

The Court noted that the Family Proceedings Act 1980 was passed in response to changing attitude in society, where long-term support of spouses after marital breakdowns was no longer regarded as appropriate or necessary. Section 64 limited the Court's discretion to award maintenance and reasonableness could not be invoked as an overriding guideline. The Act obliged the party entitled to maintenance to provide for his or her own support within a reasonable time; s 64(3) modified that obligation, but did not remove it. The husband's appeal was accordingly allowed. *Turner v Doak* (High Court, Christchurch. 21 June 1982 (M570/81). Casey J). (To be reported in [1982] FLR.)

**John McManamy**

# Law reform



## Law reform

ONE question raised by the Credit Contracts controversy (see July's "Inter Alia") is whether we should examine more closely the mechanism for law reform in New Zealand. The Minister of Justice in past statements has expressed his pride in New Zealand's system, and by all accounts he runs a tight ship at Justice. In terms of cost-benefit, it can probably be argued that New Zealand cannot afford the full-time Law Reform Commissions of the overseas variety. Geoffrey Palmer, MP, however, argues otherwise.

Before moving on, a brief digression. Palmer is the Labour shadow minister for constitutional affairs. Does this mean that somewhere out there is a real government minister operating an actual department of constitutional affairs in a Wellington monolith stuffed with public servants?

Back to the point, Palmer in an article in *Law in the Community*, argues that New Zealand's part-time committee structure, with expertise and skill provided on a volunteer basis, is no longer suited to the rapid changes in today's society. Some of the weaknesses he points out are the slow nature of committee work (eg, the gestation period for Credit Contracts was some 13 years), limited research facilities, little effective liaison between the committees and Parliament, the committees' reports rarely being of high quality, most proposals lacking public input until the matter reaches Parliament, and piecemeal and narrow choice of topics.

Palmer sees law reform as part of a new approach towards open government, with grass roots participation. He cites Mr Justice Kirby's pioneering efforts in Australia as Chairman of their Law Reform Commission. However, the first task of a New Zealand commission, Palmer argues, would be rationalise New Zealand statute law. No one would argue that there is no need here.

Finally, the cost. According to Palmer (and the New Zealand Law Society) we can have a commission at bargain basement prices — $350,000 per year for a commissioner, deputy and support staff. The issue is not likely to go away, and in all probability we will be hearing more on this proposal.

## Penal policy

MOST people are aware of the Minister of Justice's commitment to Penal Reform. In a recent speech to the Wellington Prisoners Aid and Rehabilitation Society on 28 June, the Minister noted that the *Report of the Penal Policy Review Committee* (see the April NZLJ for a series of articles on the topic) was under consideration (a Justice Department Steering Committee has been formed for the purpose). The Minister noted the dangers in adopting a piecemeal approach to Penal Reform, and there is talk that comprehensive legislative proposals will emerge in 1983. The suggestion is that the Criminal Justice Act 1954 will be repealed and replaced.

In the meantime, the government through administrative direction may be experimenting with small scale reforms. The Report's "throughcare" concept seems to have met with the Minister's approval, and there are indications that this may go ahead on a pilot basis. To quote the Minister:

> [Throughcare] is simply a recognition that the offender comes from the community: therefore the community must play its part in providing opportunities and encouragement for the offender to lead a law-abiding life.
>
> . . . .
>
> What the Committee sought was . . . to reduce the isolation of the prison and the prisoner from the ordinary community [and] to assist the released prisoner in a practical way to overcome the problems of release.

The Minister noted that "two of the major associations that represent community groups in New Zealand fully support the concept of Throughcare."

The Minister was obviously careful in his choice of words. "Concept" is entirely different from "practice", and there are very real dangers in expecting community goodwill to materialise, particularly if the government does not produce the necessary financial support. The parallel of Reagan's "volunteerism" comes to mind. This is a way of slashing social services costs without having to admit to the consequences. At present, however, there is no need to react strongly to events. One need simply acknowledge the Minister's good faith while noting the hidden dangers. The line between a creative policy involving the community and rationalised budget slashing is a thin one, and many a Minister and department head has in the past been guilty of not knowing the difference.

## Privity of contract

LEGISLATION is expected this year. The Statutes Revision Committee has completed hearings on the Bill. The few submissions received related to minor amendments and it is expected that there will be no major revisions to the Bill. The Bill implements the report of the Contracts and Commercial Law Reform Committee on Privity Contract (May 1981).

Clause 4 is the main provision of the Bill, and substantially alters the

common law rule relating to privity. Subclause 1 makes enforceable promises contained in a deed or contract for the benefit of a third party. The beneficiary is entitled to bring suit. Subclause 2 subjects third party rights, however, to the construction of the deed or contract (presumably an express provision can be inserted into the instrument to restrict the rights of the beneficiary).

Clause 5 provides for the application of cl 4, namely where:

(a) The position of the beneficiary (or another person) has been materially altered by reliance on the promise;
(b) The beneficiary has obtained judgment against the promissor upon the promise;
(c) The beneficiary has obtained against the promissor the award of an arbitrator.

Clause 5 further notes that the promise and obligation imposed by cl 4 may not be varied or discharged without the consent of the beneficiary.

Clause 8 gives the beneficiary the same rights to relief as a party to a contract.

Finally, s 7 of the Property Law Act 1952 will be repealed.

## More on law reform

FOLLOWING is a brief rundown on the activities of New Zealand's various law reform committees. With some degree of embarrassment, we note the list is reproduced from an Australian publication ([1982] *Reform* 73). In the future, the *Law Journal* will be devoting more space to commentary on reports and bills, although it will take some time before we can turn this into an airtight service. In the meantime, as a gesture of good faith:

**Contracts and Commercial Law Reform Committee**

- *Sale of Goods (Consumer Warranties).* Comments received on working paper. Awaiting preparation of draft Bill.
- *Secured Transactions.* First report presented. Matter under consideration.
- *Law of Insurance.* First report presented. Second report in preparation.
- *The Right of Set-Off.* Discussion paper in preparation.
- *Review of Arbitration Act 1908.* WIH.*
- *Frustration.* WIH.
- *Contribution in Civil Cases.* Discussion paper in preparation.

**Criminal Law Reform Committee**

- *Bail.* Final report in preparation.
- *Discovery in Criminal Cases.* WIH.
- *Drunkenness.* WIH.

**Property Law and Equity Reform Committee**

- *Positive Covenants Running with the Land.* Second working paper in preparation.
- *Share Premium Reserve Dividends.* Report in preparation.
- *Capital Profit Dividends.* WIH.
- *Law Relating to Watercourses and Adjacent Land.* WIH.
- *Law Relating to Landlord and Tenant.* WIH.
- *Trustee Investments.* WIH.

**Public and Administrative Law Reform Committee**

- *Bylaw Making Powers and Procedures of Local Bodies.* WIH.
- *Study of Discretionary Powers Conferred by Statute on Public Authorities.* Interim report on powers of entry and search presented. Final report in preparation.
- *Appeals by Way of Case Stated.* Report in final stages of preparation.
- *Privative Clauses.* WIH.
- *Delegation.* WIH.

* Work in hand.

## Access to the Law

THE Justice Department has established a working party to "review and make recommendations on the provision of government assisted and community-based legal services in New Zealand, including consideration of the proposals in the discussion paper *Access to the Law*, and taking into account what advice, representation and information are needed by the public, including the particular needs of minority groups, and in particular:

(1) To examine existing schemes, including community legal services, and possible alternative arrangements for (a) non-criminal legal matters; (b) family and domestic matters; and (c) criminal matters in terms of:
(i) their purpose, objectives and scope;
(ii) their organisation, structure and administration;
(iii) their financing — including by direct government allocation and alternative funding sources;
(iv) the need for and appropriateness of laws governing them;
(v) availability of the services; and
(vi) eligibility;
and to make recommendations thereon.

(2) To consider the need to inform and educate the public on the availability of services providing access to the law, including consideration of the needs of minority groups and groups with special needs; and to make recommendations as to how such needs can be met.

(3) To examine the need for a body to oversee the provision of legal services and to co-ordinate, administer and monitor assisted legal services; and if appropriate to make recommendations as to the functions and powers of any such proposed body, after taking into account any recommendations made under the preceding terms.

(4) To consider and if appropriate make recommendations on any associated matters that may be considered relevant to the general objects of the review.

Members of the Working Party include: M Smith, Chairman (Justice Dept), R Charters (Consumer Institute), R G Collins (NZLS nominee), J Dacre (Race Relations Conciliator), A A T Ellis QC (Legal Aid Board nominee), J Lowe (Justice Dept), N Sainsbury (Social Welfare Dept), and B Williams (Wellington Community Law Centre).

Reporting date to the Minister is 31 December 1982. Although the Department of Justice has sought a Working Party representing a wide range of views and experience (with the upper tiers of the profession in the minority), it can be regarded as a major omission not to include a practitioner who specialises in legal aid work. Having someone who sits on a Legal Aid Board or is involved in a Law Centre is not enough. Direct input is needed from someone attempting to make ends meet on legal aid. Hopefully, the Working Party can rectify this omission (say by inviting George Rosenberg when he gets back to New Zealand).

**John McManamy**

# Inter Alia

## Judges in the dock

MR Justice Kirby, with tongue undoubtedly in cheek, labelled as "the rudest law review article written for many a year" the essay by W T Murphy and R W Rowlings published in two parts beginning in the November 1981 issue of the *Modern Law Review*. Entitled "After the Ancien Regine: The Writing of Judgments in the House of Lords 1979-1980", the work examines 58 speeches made in England's highest Court during a 12 month period. Whereas Judges are accustomed to being criticised for their slight deviations in applying precedent and for their class biases, the authors hit the judiciary where it really hurts — they are attacked for their apparent inability to think clearly. Although the article passes academic muster in terms of prolix erudition, the authors mince few words. The Law Lords are described as "superficial", "simplistic", "casual", "evasive", and "irrelevant". For example:

> Assertion is used not only to despatch inconvenient arguments but also to underpin key elments such as "linguistic arguments" and "constitutional principle". Choices of possible courses of action are presented in selective terms. Judges from the past are invoked to give credence to the judgment. . . . Most striking, however, is the reliance upon rhetoric and repetition. . . .

Walker Merricks in (1981) NLJ 1244 summarises the main points:

> First the Lords are said to particularise — that is to narrow the issues to manageable proportions by declaring certain arguments to be irrelevant. Previous case law is sometimes disposed of as "unhelpful", or as "providing no guidance". Examination of prior or similar legislation is said to be "unnecessary". Having disposed of such difficulties, the issue is often declared to be "short", "simple", or "straightforward", and despatched quite rapidly. Their Lordships then seem to have developed an attachment to the idea of the "ordinary, natural" meaning of words. They give this notion a modern flavour, and contrast it with the literalism of the bad old days of Viscount Symond's time. Even when tackling clearly ambiguous phrases, Law Lords are prone to adopt a simplistic tone asserting that the "true" meaning, "the ordinary natural" meaning of the phrase is so clear that it is almost surprising that anyone should have argued it to the contrary. . . . Conclusions seem to be presented as uncontestable, obvious and self-evident, yet when analysed they often seem to be based on assertion.

And if this trend continues, the day will come when the phrase, "thinking like a lawyer", will be regarded as an insult.

## Public attitudes to lawyers

OF the three student-run law centres now in operation, two conducted preliminary studies into local legal needs. Both surveys contained a series of questions seeking to determine the public's attitude toward law and lawyers. Significantly, the Christchurch study bears out the finding of the one in Dunedin. A summary of the findings:

(1) *The public's regard for the legal system is low.*
   (a) In Dunedin only 36 percent of the sample thought the law treats rich and the poor equally. In Christchurch — 27 percent.
   (b) 38 percent of the sample in Dunedin thought the law is out of touch with modern society. In Christchurch — 47 percent. In Dunedin 40 percent thought the Courts give different sentences to the rich and the poor. In Christchurch — 61 percent.

(2) *On the other hand, the public's regard for lawyers in both locales is high.*
   (a) In Dunedin 75 percent of the sample believe they get fair and sympathetic hearings from lawyers. In Christchurch — 77 percent.
   (b) In Dunedin 67 percent think lawyers have a good understanding of their client's problems. In Christchurch — 55 percent.

(3) *Both surveys debunked several myths about the public image of lawyers.*
   (a) In Dunedin only 27 percent

thought lawyers charge all they can. In Christchurch — 42 percent.

(b) Only 30 percent of the Dunedin sample felt baffled by lawyers use of jargon. In Christchurch — 41 percent.

(c) In Dunedin only 21 percent believe lawyers side with the authorities rather than their clients. In Christchurch — 25 percent.

(4) *On the other hand, lawyers can learn a few lessons from the following results:*

(a) Seventy-two percent of the Dunedin sample had no idea of what it cost upon consulting a lawyer. Christchurch — 83 percent.

(b) Forty-two percent of the Dunedin sample had not seen a lawyer in the past two years. Christchurch — 52 percent.

Both studies were based on random computer samples in consultation with various University departments. The Dunedin survey purported to represent the city as a whole whereas Christchurch concentrated on the inner city area. The narrower range of the Christchurch survey would probably account for the slightly higher negative response rate. Those wishing to make a fuller comparison of the surveys are referred to the 1981 and 1982 issues of *Law in the Community* published by the Dunedin Community Law Centre.

## Trial by press

SOME of the most moving journalistic photos one can remember were those featured in Wellington "Evening Post". These were pictures of the families of the defendants in the Lester Epps murder/manslaughter trial as they reacted to the verdicts. Unfortunately, the *Post* showed no similar sympathy for the family and friends of the deceased and has come under heavy criticism for its lack of balanced coverage (see eg, the June issue of the *Media Times*).

One could rightly argue that the *Post* sailed close to the wind of the laws of contempt of Court. The commentary that flowed after the verdict was announced but before sentence was passed overstepped the bounds of mere bias; there was simply no pretence in presenting the other side. There was, for instance, a child born after Epps was killed — no mention of that. Just pages on the prisoners. It is of course not the purpose of this publication to suggest who we should turn our sympathies to. The issue as should be apparent by now is in the dangers of trial by press, and with the exception of the coverage in the *New Zealand Times*, one of the parties never had a chance.

## Trial by apprentice

This story is typical of new lawyers;

New lawyer was negotiating a plea-bargain with the police prosecutor. The prosecutor indicated that he would drop the receiving charge if the client pleaded guilty to minor theft. New lawyer suggested that the client would prefer to plead guilty to receiving instead. The prosecutor replied: "That charge carries seven years, I'm offering you one."

## Advocacy

YOU older ones have probably heard the story. For the benefit of those newer members of the Bar, it is worth re-telling. Lord Birkett was prosecuting a murder and an expert witness for the defence provided a credible alternative theory to the cause of the death. His testimony was virtually unassailable. Not to be intimidated by the expert, however, Birkett rose to his feet and asked the simple question:

> What is the co-efficient of the expansion of brass?

After that, the rest was easy. Exit one shaken and totally discredited expert witness.

Of course, cross-examination can backfire in one's face. Every advocate knows the dangers of asking the one question too many. In one case a young man was charged with having unlawful sexual intercourse with a girl under 16. The corroborative evidence supporting the girl's story came from a farmer who said he had seen the pair lying together in a field. He was asked:

> *Counsel:* When you were a young man did you ever take a girl for a walk in the evening?
> *Farmer:* Aye, that I did.
> *Counsel:* Did you ever sit and cuddle her on the grass in a field?
> *Farmer:* Aye, that I did.
> *Counsel:* And did you ever lean over and kiss her while she was lying back?
> *Farmer:* Aye, that I did.
> *Counsel:* Anybody in the next field, seeing that, might easily have thought you were having sexual intercourse with her?
> *Farmer:* Aye, and they'd have been right too.

(Readers are referred to Richard Du Cann's book *The Art of the Advocate* (Penguin) for further gems.)

## Cheek of the week

TO those anonymous bureaucrats who sneaked through Statutory Regulation SR 1982/133. As we are all aware, there is a wage freeze on. This presumably freezes Offender's Legal Aid rates despite the dismal remuneration. Oh well, for a year, at least, we're all equal, even if the Crown Solicitors are four times more equal. Wanna bet? Just before the freeze was announced, SR 1982/133 came through. You guessed it. Another pay raise for Crown Solicitors.

## Two on sex terminology

APRIL'S *Guardian Gazette* noted that a woman appointed as Judge of the High Court in England is properly addressed in Court as Mrs Justice, even if she is unmarried. The *Gazette* note queries this practice and observes that this may amount to a carrige of Miss Justice.

THE Human Rights Commission does not require the invention of new words or the wholesale use of the word "person". The suffix "-man" is not of itself proof that women are being discriminated against. *HRC News*, June 1982.

## More on rule of law

DAMS go up — laws come down. I despair, one takes comfort in British humourist Peter Cook: "In this country justice not only has to be seen to be done, it has to be seen to be believed."

**John McManamy**

# People

AUTUMN. The harvest is in, the poplars are turning gold, and the paddocks are alive with the youth of New Zealand playing soccer. Soccer? Well, even hardened rugby supporters are acknowledging the upsurge of interest in the code (as they call it), according to Lower Hutt practitioner **Terry Killalea**. Terry for four years was Chairman of the NZ Football Association. Under his stewardship, New Zealand soccer (or football as he prefers) emerged from limbo to — well, we all know the story now. Nice going, Terry.

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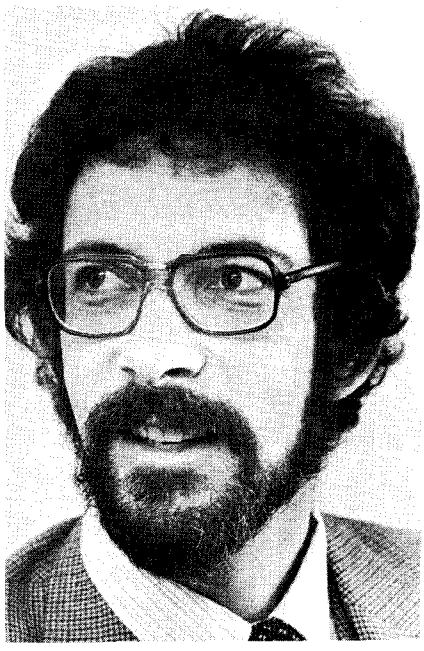

*George Rosenberg*

IN July, retired Court of Appeal President and very active editor, **Sir Alexander Turner**, celebrated his ninth year at Butterworths. Sir Alex began his association as editor of the *NZ Halsbury* and has since assumed responsibility for the company's professional legal texts. Publishing demands the same high standards as legal argument, only there are no adjournments or extensions of time — only deadlines. Those doubly blessed by having appeared before Sir Alex and written copy for him will certify that here is a demanding taskmaster who is all the more effective for his touch of wit. Whether before the Bar, on the Bench, or behind the editor's desk, Sir Alex has assumed a large presence in the profession and his continuing service will be appreciated by all.

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BY now, most lawyers are aware of Auckland practitioner **Bryce Craig**. He was hit by a speeding police car while crossing a road and sustained very serious head and body injuries. He was initially kept alive by various life-support apparatus, though no one held out much hope, either for his survival or his return to a normal existence. However, Bryce proved the experts wrong. In defiance of nearly everyone's expectations, Bryce has slowly battled his way back. Recently, after five months, Bryce was able to leave Auckland Hospital and begin his recuperation on his parents' farm in Balclutha.

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CONGRATULATIONS are in order to the newly-amalgamated firm of **Buddle Findlay**, formerly **Buddle Anderson Kent and Co** and **Findlay Hoggard Richmond and Co**. The firm now comprises 25 partners and 19 staff solicitors. At present, the firm's offices are housed in three different locations (see the notice in the classified section) until new quarters become available in the Bank of New Zealand Building, under construction. Buddle Findlay still has a way to go, however, before it hits the international big-time: The largest firm in New York City boasts 341 lawyers — 90 partners, 238 associates, and 13 counsel.

*Dr George Barton*

•

A lot has been said of the integrity of an independent Bar. While the result in *Lesa's* case may have caused consternation to some, it is at the same time reassuring to know that two lawyers were willing to press a highly controversial argument in the interest of their client (and by extension the public). The lawyers who took the case to the Privy Council would argue that they are by no means alone, that this is common practice. Yet, the occasion is worth noting and the names of **George Rosenberg** and **Dr George Barton** deserve special mention. A brief background story is featured later inside this journal.

# Lesa v Attorney-General — the story behind the judgment

*John McManamy*

> A short answer to that submission is that by incorporating into New Zealand law the provisions of s 1(1)(a) of the Imperial Act the New Zealand Parliament did not change the meaning of those provisions.
> *Levave v Immigration Department* [1979] 2 NZLR 74, 77 Court of Appeal per Somers J.
>
> Our view, in short, is that in declaring that the Acts of 1923 and 1928 were to apply to Western Samoa, then a mandated territory, as if it were part of New Zealand, the New Zealand legislature indicated no intention of making all persons born there in future British subjects. Indeed we think it inconceivable that the legislature had any such intention.
> *Lesa v Attorney-General* (Court of Appeal, 15 April 1981 (CA15/80) per Cooke J).

THE Court of Appeal could not be more clear. Counsel who had argued this hopeless brief accepted the Court's rebuke with quiet dignity — and appealed to the Privy Council.

George Rosenberg operates the equivalent of a store front law office in the Wellington suburb of Newtown. His clientele is largely Polynesian and Maori. Operating a practice in Newtown is not the easiest proposition, legal aid rates being what they are. For Rosenberg, the problem is compounded. A good portion of his cases deal in immigration. Immigration cases do not qualify for legal aid.

Rosenberg wanted to be more than a traditional lawyer — that is the prototype disinterested advocate in the taxi-rank. He wanted to apply his professional skills and standards to people traditionally deprived of legal power — and legal counsel. This is the speciality of the American neighbourhood lawyer and English community lawyer. They rock the boat. They sue government departments rather than represent them. They are seen at meetings more often than in Court. They organise pressure groups rather than companies. In brief, lawyers like Rosenberg are trying to balance the scales of justice. Unfortunately, this activity does not pay the bills. Rosenberg noted as much in a letter to the Minister of Justice:

> . . . I think the practice is succeeding economically, but unfortunately this has been at the expense of my ideals. I have had to become more and more hard-headed about fees, and I have almost reached the stage where, despite my earnest and idealistic desire to work in such areas, I cannot afford to carry out work on criminal legal aid (27 Feb 1980).

Nevertheless, Rosenberg does what he can. In 1978, he acted for a Samoan overstayer. She was duly convicted in the District Court and her appeal was dismissed in the High Court. By now, Rosenberg knew that his legal argument was sound. He had consulted a senior member of the Bar, Doctor George Barton. Together, they drew up a carefully constructed argument for the Court of Appeal. By virtue of previous Imperial and New Zealand legislation, they argued, Western Samoans were deemed to be natural-born British subjects and were to be treated as if they were born in New Zealand.

The Court of Appeal did not agree. Their decision led to an inescapable conclusion. Parliament could not have intended what counsel suggested. Procedural technicalities prevented an appeal to the Privy Council. Because the appeal was from a conviction in the District Court, there was no further appeal. Many would have written off entertaining an appeal as an uphill battle, anyway.

Rosenberg and Barton, however, both believed in their argument. Another case was prepared. Falema'i Lesa, from Western Samoa, was being prosecuted in the District Court as an overstayer. By bringing proceedings in the form of an originating summons seeking a declaration it was procedurally possible to take her case to the Privy Council. The case worked its way on a pro forma basis through the New Zealand Courts.

Since *Levave*, Rosenberg's bona fides had been questioned on repeated occasions. The effect of two consecutive cases on appeal tied up hundreds of similar prosecutions. It became routine for Rosenberg to show up in District Court asking for some 50 stays of prosecution for his clients (crowded into the Courtroom with their families) until the point of law could be settled on appeal. In Auckland, the Judges some two years ago began refusing stays and entering convictions.

Rosenberg's test of good faith went beyond the establishment. The Privy Council appeal was an acid test with the Samoan community. If they did not share his confidence then the appeal would be off — it was as simple as that. Without their support and contributions there could be nothing. Funds began to trickle in. More organised fundraising came from the community. Rosenberg's office organised itself around the logistics of the appeal. A fixture was arranged. Past debts were cleared. Rosenberg's trip was paid for. At the last minute, Barton was given the green light.

As everyone now knows, Rosenberg and Barton were vindicated by the Privy Council. Their legal argument was considered and accepted. The only blemish in the decision was that the Privy Council thought that an argument was advanced before them that had not been put before the Court of Appeal. Because of this, the order for costs was not what would have been expected.

According to the people in Rosenberg's and Barton's offices, both lawyers accepted their victory in much the same manner they faced defeat — with quiet dignity. That is the type of people they are. Barton is now on holiday in Edinburgh and last heard of Rosenberg was trying to obtain tickets for the Wagner Festival at Bayreuth.

# Lesa v Attorney-General

*Following is the complete judgment of the Privy Council, as transmitted by telex to the Ministry of Foreign Affairs and released by the Minister of Justice:*

Privy Council
Answer to question in originating summons given 19 July 1982
Written advice delivered 28 July 1982
Lord Diplock, Lord Elwyn-Jones, Lord Keith of Kinkel, Lord Brandon of Oakbrook, and Sir John MeGaw

*Citizenship — Status of Western Samoans — Effect of British Nationality and Status of Aliens Act (in New Zealand) Act 1928 — Whether Western Samoans are natural-born British subjects under New Zealand law.*

IN *Levave v Immigration Department* [1979] 2 NZLR 74, the Court of Appeal rejected the appellant's argument that by virtue of her descent, she as a Western Samoan was a British subject under New Zealand law with full rights of citizenship, and thereby exempt from prosecution as an "overstayer" under s 14(5) of the Immigration Act 1964. Because that case came before the Court of Appeal on appeal from the District Court, there could be no further appeal to the Privy Council.

In the present case, the material facts were the same, except that the appellant claimed New Zealand citizenship by virtue of birth rather than descent. At the time of the appeal, the appellant was being prosecuted in the District Court. To enable an appeal to proceed to the Privy Council, proceedings were brought in the form of an originating summons seeking a declaration to the construction of the Act of 1928.

**Held:** By virtue of the Act of 1928, New Zealand formed part of His Majesty's dominions and allegiance. Section 7(1) of the Act, on its proper construction extended His Majesty's dominions and allegiance to the Cook Islands and Western Samoa. By reference to the Second Schedule of Part I of the British Nationality and Status of Aliens Act 1914 (Imperial), which was adopted by the Act of 1928, Western Samoans were included as persons deemed to be natural-born British subjects. It followed that persons born or resident in Western Samoa during the period the 1928 Act was in force were to be treated as if they had been born or resident in New Zealand proper.

**Appeal**
This was an appeal on a question of law from a decision of the Court of Appeal (15 April 1981) rejecting the appellant's claim to status as a British subject under New Zealand law.

*G P Barton* and *G H Rosenberg* for the appellant.
*D P Neazor QC* and *R B Squire* for the respondent.

Advice to Her Majesty was delivered by

**Lord Diplock.** The appellant was born in Western Samoa on a date between the coming into force of the British Nationality and Status of Aliens (in New Zealand) Act 1928 ("the Act of 1928") and its repeal and replacement by the British Nationality and New Zealand Citizenship Act 1948. She claims that on the true construction of the Act of 1928 by virtue of her birth in Western Samoa during that period she became, so far as New Zealand Law is concerned, a natural-born British subject and she seeks in the instant appeal a declaration to that effect. If she be right on the construction of the Act of 1928 the consequence would be that upon the coming into force of the Act of 1928 she became under s 16(3) of that Act a New Zealand citizen, and under s 13 of the Citizenship Act 1977, has continued to be one ever since.

The importance to the appellant of establishing her New Zealand citizenship is that it frees her from all restraints upon her continued stay in New Zealand that are imposed on immigrants by the Immigration Act 1964. The appellant in the instant case is an "overstayer", as was the appellant in *Levave v Immigration Department* [1979] 2 NZLR 74. On arrival in New Zealand she had been granted a permit to stay for a limited period and had remained in New Zealand after that period had expired — An offence under s 14(5) of the Immigration Act 1964, for which she is currently being prosecuted. *Levave v Immigration Department* came before the Court of Appeal upon an appeal in a similar prosecution before a Magistrate's Court, on which the decision of the Court of Appeal is final. No further appeal lies to Her Majesty in Council. It was in order to enable such further appeal to be brought that the proceedings in the instant case have taken the form of an originating summons seeking a declaration as to the construction of the Act of 1928.

The decision of the Court of Appeal in the *Levave* case turned on the construction not of the Act of 1928 but of its predecessor, the British Nationality and Status of Aliens (in New Zealand) Act 1923 ("the Act of 1923"). The wording of the provision in that Act principally relied on by the appellant in the *Levave* case, s 14(1), was identical to the wording of the Act of 1928 that is principally relied on by the appellant in the instant case, which reads as follows:

> 7(1) Subject to the provisions of this section, this Act shall apply to the Cook Islands and to Western Samoa in the same manner in all respects as if those territories were for all purposes part of New Zealand, and the term "New Zealand" as used in this Act shall, both in New Zealand and in the said territories respectively, be construed accordingly as including the Cook Islands and Western Samoa.

There are however substantial differences between other provisions of the two Acts which form the contexts in which those two identically worded subsections fall respectively to be construed. Unfortunately, in the instant case, because it was common ground between the parties that the decision of the Court of Appeal in the *Levave* case was decisive of the instant case in that Court, no substantive argument based upon the terms of the Act of 1928, looked at as a whole, was advanced by either party in the Courts below, and, doubly unfortunately, this resulted in there not having been brought to the attention

of the Court of Appeal a formidable argument, which makes the Court of Appeal's reasoning in the *Levave* case more difficult to sustain when it is sought to apply it to the construction of the Act of 1928. The appellant's written case to this Board gave no forewarning. It emerged for the first time in the closing stages of the appellant's counsel's opening speech. A less powerful variant of that argument would have been available on the construction of the Act of 1923, but it had not been advanced in the Court of Appeal by the appellant in the *Levave* case.

Their Lordships will accordingly go straight to the Act of 1928 and first consider its construction independently of the Act of 1923 which it repealed.

The preamble of the Act of 1928 reads as follows:

> An Act to adopt Part II of the British Nationality and Status of Aliens Act 1914 (Imperial), to make certain provisions relating to British Nationality and the Status of Aliens in New Zealand, and also to make special provisions with respect to the naturalisation of persons resident in Western Samoa.

So part of its purport and object is to provide a way for persons resident in Western Samoa to become British Subjects by naturalisation.

Section 2 defines the "Imperial Act" as the British Nationality and Status of Aliens Act 1914: and s 3 provides that "Part II of the Imperial Act (the said Part being set out in the First Schedule hereto) is hereby adopted."

The First Schedule sets out in its entirety Part II of the Imperial Act which bears the heading "Naturalisation of Aliens". Those sections set out in the First Schedule that are most directly relevant to the question of construction that Their Lordships have to answer are the following:

> 2(1) The Secretary of State may grant a certificate of naturalisation to an alien who makes an application for the purpose, and satisfies that Secretary of State —
> (a) that he has either resided in His Majesty's dominions for a period of not less than five years in the manner required by this section, or been in the service of the Crown for not less than five years within the last eight years before the application; and
> (b) that he is of good character and has an adequate knowledge of the English language; and
> (c) that he intends if his application is granted either to reside in His Majesty's dominions or to enter or continue in the service of the Crown.
> (2) The residence required by this section is residence in the United Kingdom for not less than one year immediately preceding the application, and previous residence, either in the United Kingdom or in some other part of His Majesty's dominions, for a period of four years within the last eight years before the application.
> . . . .
> 7(2) Without prejudice to the foregoing provisions the Secretary of State shall by order revoke a certificate of naturalisation granted by him in any case in which he is satisfied that the person to whom the certificate was granted either —
> (a) . . . .
> (b) has within five years of the date of the grant of the certificate been sentenced by any Court in His Majesty's dominions to imprisonment for a term of not less than twelve months, or to a term of penal servitude, or to a fine of not less than one hundred pounds; or
> (c) . . . .
> (d) has since the date of the grant of certificate been for a period of not less than seven years ordinarily resident out of His Majesty's dominions, . . . and has not maintained substantial connection with His Majesty's dominions; or
> (e) . . . .
>
> 8(1) The Government of any British possession shall have the same power to grant a certificate of naturalisation as the Secretary of State has under this Act, and the provisions of this Act as to the grant and revocation of such a certificate shall apply accordingly, with the substitution of the Government of the possession for the Secretary of State, and the possession for the United Kingdom, and of a High Court or Superior Court of the possession for the High Court, and with the omission of any reference to the approval of the Lord Chancellor, and also, in a possession where any language is recognised as on an equality with the English language, with the substitution of the English language or that language for the English language:
> . . . .
> (2) Any certificate of naturalisation granted under this section shall have the same effect as a certificate of naturalisation granted by the Secretary of State under this Act.
>
> 9(1) This part of this Act shall not, nor shall any certificate of naturalisation granted thereunder, have effect within any of the dominions specified in the First Schedule to this Act, unless the legislature of that dominion adopts this part of this Act.
> (2) Where the legislature of any such dominion has adopted this part of this Act, the Government of the dominion shall have the like powers to make regulations with respect to certificates of naturalisation and to oaths of allegiance as are conferred by this Act on the Secretary of State.
> (3) The legislature of any such dominion which adopts this Part of this Act may provide how and by what department of the Government the powers conferred by this part of this Act on the Government of a British possession are to be exercised.
> (4) . . . .

These were provisions contained in an Act of the United Kingdom Parliament, to which the United Kingdom Interpretation Act 1889 applied. So far as is relevant, the definition in the Interpretation Act 1889 of the expression "British possession" which appears in ss 8 and 9 of the First Schedule to the Act of 1928 was "any part of Her Majesty's dominions exclusive of the United Kingdom".

It follows that unless, during the period between the coming into effect of the Act of 1928 and its repeal by the Act of 1948, Western Samoa was to be treated, for the purposes of the Act of 1928, as part of His Majesty's dominions, the combined effect of ss 8(1) and 2(1) and (2) of the Imperial Act set out in the First Schedule of the Act of 1928 would have been that past residence in Western Samoa could not enable a person to acquire the necessary qualification for naturalisation under s 2(1)(a) and (2) nor would an intention of future residence in Western Samoa satisfy the requirements of s 2(1)(c); on the contrary, seven years' residence in Western Samoa after naturalisation

would render a person's certificate of naturalisation liable to revocation under s 7(2)(d). The adoption of Part II of the Imperial Act would, therefore, not be sufficient of itself to effect the object expressed in the Preamble of the Act of 1928 "to make special provisions with respect to the naturalisation of persons resident in Western Samoa", unless the effect of s 7(1) was to require Western Samoa to be treated as being "in His Majesty's dominions" for the purposes of the provisions contained in the First Schedule.

Section 6 of the Act of 1928 which, although expressed more succinctly, is substantially to the same effect as s 3 of the Act of 1923, reads as follows:

> 6 The several provisions of the Imperial Acts set forth in the Second Schedule to this Act, in so far as the said provisions are capable of application in New Zealand, are hereby declared to be part of the law of New Zealand.

The provisions of the Imperial Acts set out in the Second Schedule which are directly relevant to the instant appeal are in Part I of the Imperial Act of 1914 under the heading "natural-born British subjects". They are:

> 1(1) The following persons shall be deemed to be natural-born British subjects namely:
> (a) any persons born within His Majesty's dominions and allegiance; and
> (b) any person born out of His Majesty's dominions whose father was, at the time of that person's birth, a British subject, and who fulfils any of the following conditions, that is to say, if either —
> (i) his father was born within His Majesty's allegiance; or
> (ii) his father was a person to whom a certificate of naturalisation had been granted; or
> (iii) his father had become a British subject by reason of any annexation of territory; or
> (iv) his father was at the time of that person's birth in the service of the Crown; or
> (v) his birth was registered at a British consulate within one year or in special circumstances, with the consent of the Secretary of State, two years after its occurrence, or, in the case of a person born on or after the first day of January, nineteen hundred and fifteen, who would have been a British subject if born before that date, within twelve months after the first day of August, nineteen hundred and twenty-two; and
> (c) any person born on board a British ship, whether in foreign territorial waters or not: provided that the child of a British subject, whether that child was born before or after the passing of this Act, shall be deemed to have been born within His Majesty's allegiance if born in a place where by treaty, capitulation, grant, usage, sufferance, or other lawful means, His Majesty exercises jurisdiction over British subjects:

In the instant case the appellant's claim to have been a natural-born British subject at the time of the passing of the Act of 1948, and therefore to have then become a Citizen of New Zealand, is based on the proposition that the effect of s 7(1) of the Act of 1928 is to require Western Samoa to be treated as "within His Majesty's dominions and allegiance" for the purposes of the provisions of s 1 of the Imperial Act contained in the Second Schedule to the Act of 1928. So it is s 7 that is crucial to her claim to be a natural-born British subject in New Zealand Law despite the fact that she would not be deemed a natural-born British subject under the Imperial Act itself.

For convenience of reference their Lordships set s 7 out here in full although this involves repetition of subs (1) which has already been cited in this opinion:

> 7(1) Subject to the provisions of this section, this Act shall apply to the Cook Islands and to Western Samoa in the same manner in all respects as if those territories were for all purposes part of New Zealand; and the term "New Zealand" as used in this Act shall, both in New Zealand and the said territories respectively, be construed accordingly as including the Cook Islands and Western Samoa.
> (2) In the application of this Act to the Cook Islands and Western Samoa —
> (a) the power to grant certificates of naturalisation shall be vested in the Governor-General, and in the case of a person resident in the Cook Islands shall be exercised on the recommendation of the Minister for the Cook Islands, and in the case of a person resident in Western Samoa shall be exercised on the recommendation of the Minister of External Affairs:
> (b) the oath of allegiance shall be taken before a Judge or Commissioner of the High Court of the Cook Islands, or a Judge or Commissioner of the High Court of Western Samoa, as the case may require, and every such Judge and Commissioner is hereby respectively authorised to administer the said oath accordingly:
> (c) the powers conferred by s 5 of the Imperial Act, in its application to New Zealand, shall be vested in the Governor-General:
> (d) the powers conferred by sections 7 and 7(a) of the Imperial Act, in its application to New Zealand, shall be exercised only by the Governor-General in Council.

Subsection (1) is in two parts separated by a semi-colon. The second part after the semi-colin is merely an interpretation provision giving to the expression "New Zealand", wherever it appears in the Act of 1928, a more extended meaning than it would otherwise bear by virtue of s 4 of the Acts Interpretation Act 1924, viz "the Dominion of New Zealand, comprising all islands and territories within the limits thereof for the time being other than the Cook Islands".

The first part of subs (1), however appears to state emphatically and unequivocally that the whole of the Act, subject only to such modifications as are contained in s 7 itself, ie in subs (2), are to apply both to the Cook Islands and to Western Samoa in the same manner in all respects as if those territories were for all purposes part of New Zealand. The reference to their being "part of New Zealand" echoes, in the case of the Cook Islands, the Order in Council of 1901, referred to in the Preambles to the Cook Islands Act, 1915, under which it was ordered that the Cook Islands "should form part of New Zealand"; and, in the case of Western Samoa, art 2 of the League of Nations Mandate for German Samoa scheduled to the Samoa Act 1921, which provided:

> The mandatory shall have full power of administration and legislation over the territory, subject to the present

> mandate, as an integral portion of the Dominion of New Zealand to the territory, subject to such local modifications as circumstances may require.
>
> The mandatory shall promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory subject to the present mandate.

Since in 1928 New Zealand formed part of His Majesty's Dominions and was within His Majesty's allegiance, if the Act is to apply to Western Samoa "In the same manner in all respects" as if that geographical area were "for all purposes part of New Zealand", this unambiguous meaning of s 7(1) would appear to be that Western Samoa as well as New Zealand proper and the Cook Islands must be treated as part of His Majesty's dominions and within His Majesty's allegiance, in every case where the status of any person in New Zealand either as a natural-born British subject or as an alien eligible for naturalisation as a British subject depends upon his, or his father's, having been born in Western Samoa or, in the case of eligibility for naturalisation, upon his having resided there.

It is, in Their Lordships' view, impossible to read down s 7(1) of the Act of 1928, as confined to the naturalisation of aliens residing in the Cook Islands and Western Samoa, as the Court of Appeal felt able to do with the corresponding s 14(1) of the Act of 1923 in the Levave case. Section 7(2)(a) plainly contemplates that residence in Western Samoa during the year immediately preceding an application shall constitute the residence required to qualify for naturalisation under s 2(1)(a) and (2) of the Imperial Act set out in the First Schedule as applicable in New Zealand with the modifications for which s 8(1) of the Imperial Act the required residence must have been "in His Majesty's dominions" and, under s 2(2) as modified by s 8(1), the residence for not less than one year immediately preceding the application must be in a part of His Majesty's dominions exclusive of the United Kingdom. So if s 7(1) and (2) had any effect at all in New Zealand law to enable aliens resident in Western Samoa to be naturalised as British subjects, which was one of the objects stated in the Preamble to the Act, s 7(1) must have had the effect of requiring the territory of Western Samoa to be included in the description "His Majesty's dominions" wherever that expression is used in the provisions of the Imperial Act set out in the First Schedule to the Act of 1928, and also included in the description "British possession" in s 8(1) of the Imperial Act.

It is, in Their Lordships' view, impossible to read down s 7(1) of the Act of 1928. . . .

In Their Lordships' view, there is no escaping that s 7(1) of the Act of 1928, means what it so emphatically and unequivocally says: a person born or resident in Western Samoa is to be treated . . . as if he had been born in New Zealand proper

If this be so, and it seems to Their Lordships to be inescapable, it would seem also to follow from the emphatic generality of s 7(1) — "In the same manner in all respects" and "for all purposes part of New Zealand" — that the section requires that the territory of Western Samoa is to be treated as included in the description "His Majesty's dominions and allegiance" in the definition of persons who shall be deemed to be natural-born British subjects in s 1 of the Imperial Act set out in the Second Schedule and declared to be part of the Law of New Zealand by s 6 of the Act of 1928. The only distinction between this description and the corresponding description of territory in Part II of the Imperial Act, birth within which confers the status of a natural-born British subject, is the addition of the words "and allegiance". But it is horn book law, or at any rate well-established as long ago as *Calvin's Case* (1608) 7 Co Rep 1A that a person born within His Majesty's dominions did by virtue of his birth there of itself owe natural allegiance to His Majesty, unless he was born there either (a) as a child to the diplomatic representative of a foreign state or, to use the older terminology, a "public minister" of a foreign state, who at common law (which in this respect followed the law of nations) owed no allegiance, even local, to the Sovereign to whom he was accredited (*Magdalena Steam Navigation Co v Martin* (1859) 2 El and El 94): or (b) was born as a child of a member of an invading force of an enemy power or of an alien in an enemy-occupied part of His Majesty's dominions.

The reasons why in subpara (1) of para (b) of s 1(1), which deals with British subjects by descent, the reference to the father of a person claiming to be a natural-born British subject, refers only to the father's having been born "within His Majesty's allegiance" and omits any reference to his having been born within His Majesty's dominions, are to be found mainly in the first proviso which refers to foreign territories in which the Crown exercised jurisdiction over British subjects under the Foreign Jurisdiction Act 1890 although such territories did not form part of His Majesty's dominions. Most other British subjects born in foreign territory but yet within His Majesty's allegiance, such as children born to British diplomats in the foreign state to which they were accredited and children born to male members of British forces on foreign soil, would be covered by subpara (b)(iv) of s 1(1) of the Imperial Act but the heir to the throne and the children of the Sovereign if born abroad would be born within His Majesty's allegiance but not within his

dominions and subpara (b) (1) caters for them also.

Their Lordships therefore cannot see how any principle of construction would justify them in holding on the one hand that s 7(1) required Western Samoa to be treated in the same way as if it were part of New Zealand in the respect that New Zealand was "in His Majesty's dominions" for the purposes of the provision of Part II of the Imperial Act declared to be adopted by s 3 of the Act of 1928, (as it must be if the declared object of the Act of making provision for the naturalisation of persons residence in Western Samoa is not to be utterly defeated), yet would justify them on the other hand in holding that s 7(1) did not require Western Samoa to be treated as if it were part of New Zealand in the respect that New Zealand was within "His Majesty's dominions and allegiance" or "within His Majesty's allegiance" for the purpose of s 1(1) of the Imperial Act declared by s 6 of the Act of 1980 to be part of the law of New Zealand.

In Their Lordships' view, there is no escaping that s 7(1) of the Act of 1928 means what it so emphatically and unequivocally says: a person born or resident in Western Samoa is to be treated in the same manner in all respects for all the purposes of the Act of 1928 as if he had been born or resident in New Zealand proper.

Their Lordships now turn to a consideration of the reasoning of the Court of Appeal in the *Levave* case (supra). They emphasise that what fell to be construed in that case was the Act of 1923. Its terms presented less formidable obstacles to construing s 14(1) of that Act as confined to the naturalisation of aliens residing in the Cook Islands and Western Samoa than the obstacles which in Their Lordships' view prevent a similar limited construction being given to s 7 of the Act of 1928. The Act of 1923 declared to be part of the law of New Zealand those provisions of the Imperial Act that were subsequently set out in Schedule 2 of the Act of 1928, including, in particular, s 1 of the Imperial Act defining natural-born British subjects, but it did not adopt Part II of the Imperial Act. Instead, by ss 4 to 12, the Act of 1923 provided for its own system of local naturalisation. The relevant qualification for local naturalisation was dealt with by ss 4 and 5. It was residence "within New Zealand" and thus, by the extended definition of New Zealand for which the second part of s 14(1) provided, included residence in the Cook Islands or Western Samoa. The only reference to "His Majesty's dominions" in the naturalisation provisions occurred in s 5(1)(c) which required the Minister to be satisfied that the applicant for naturalisation intended "to continue to reside in His Majesty's dominions, or to enter, or continue in, the service of the Crown".

This provision does not appear to have been drawn to the attention of the Court of Appeal in the *Levave* case. If it had been one does not know how it would have affected that Court's decision. It is necessarily implicit in the reference to "continue to reside" that residence in Western Samoa which qualified the applicant for the grant of a certificate of naturalisation was treated by the draftsman as residence in His Majesty's dominions. Furthermore, if it were right that the first part of s 14(1) did not have the effect of requiring Western Samoa to be treated as part of New Zealand therefore within His Majesty's dominions, at any rate for the purposes of s 5(1)(c) of the Act of 1923, ss 4 and 5 would have the result that aliens resident in Western Samoa could not obtain naturalisation, if they intended to go on residing there but could only obtain it if they wanted to emigrate from Western Samoa to New Zealand proper or to the Cook Islands. This result can hardly have been that intended by the New Zealand Parliament; and because the Court of Appeal were not referred to s 5(1)(c), it is not what the Court of Appeal regarded as being the effect of s 14(1) on the naturalisation provisions of the Act.

In referring to the language of the first part of s 14(1) of the Act of 1923, the Court of Appeal in the *Levave* case omitted what in Their Lordships' view are the important words, "in the same manner in all respects". If effect is given to these words it is not in Their Lordships' view possible to say that the only natural meaning of the first part of the subsection is that natural-born British subjects born within His Majesty's dominions and allegiance are to be treated as natural-born British subjects under the law of the Cook Islands and the law of Western Samoa. It is not suggested how such a limited provision could affect the status of such persons in either territory. Nor, in Their Lordships' view, is any ground for failing to give to s 14(1) what would otherwise be its plain meaning provided by the fact that the subsection would have greater consequences in Western Samoa since the Cook Islands were already part of His Majesty's dominions and so long as they remained so persons born there would be deemed to be natural-born British subjects without the assistance of s 14(1).

The strongest argument relied on in the *Levave* case in favour of giving to the Act of 1923 a construction that did not involve treating as a British national in New Zealand persons born in Western Samoa after the passing of the Act is to be found in the resolutions of the Council of the League of Nations resolved upon in 1923 shortly before the Act was passed. They are set out in the judgment. Their meaning is not expressed with crystal clarity, but it would be right to say that they deprecate the automatic bestowal of the nationality of the mandatory power upon inhabitants of the mandatory territory, though there would appear to be some inconsistency here with the provision in art 2 of the terms of the mandate that Western Samoa was to be covered as an "integral portion of the Dominion of New Zealand". The Act of 1923 spoke for the future; it did not on any view of its construction bestow New Zealand nationality upon any native inhabitants of Samoa born before the passing of the Act; they retained whatever nationality, if any, they had previously possessed. Despite the fact that the resolutions did not impose upon the Government of New Zealand any obligation binding upon it in international law, Their Lordships agree with the Court of Appeal that the resolutions would be relevant in resolving any ambiguity in the meaning of the language which is common to s 14(1) of the Act of 1923 and s 7(1) of the Act of 1928. They are, however, unable, for the reasons already stated, to discern any ambiguity or lack of clarity in that language in its application to s 1 of the Imperial Act adopted as part of the law of New Zealand by both the Act of 1923 and the Act of 1928.

For these reasons Their Lordships will humbly advise Her Majesty that this appeal should be allowed, and the question asked in the originating summons should be answered yes. The respondent must pay the appellant's costs of this appeal. As the point on which the appellant has succeeded was not taken in the Court of Appeal each party should bear their own costs in that Court.

Solicitor for the appellant: *G H Rosenberg* (Wellington).
Solicitor for the respondent: *Crown Solicitor* (Wellington).

# The Law Practitioners Bill — Parliamentary debate begins

*On July 21-22, the Statutes Revision Committee reported the Law Practitioners Bill back to the House of Representatives. Following are extracts from the debates, arranged according to subject matter. The editor wishes to convey his gratitude to the offices of the House for making available advance copies of Hansard. Further debate, when the Bill comes up for second reading, will be reported in next month's NZLJ.*

## Introduction

*Mr D M J Jones (Helensville):* I am directed to report that the Statutes Revision Committee has carefully considered the Law Practitioners Bill and recommends that the Bill be allowed to proceed as amended. I move, *That the report do lie upon the table.* I should like to explain the various amendments that have been made to this somewhat lengthy Bill relating to law practitioners and various aspects of the practice of law such as law societies, the Council of Legal Education, admission and enrolment to the law, and practices in the legal profession.

After receiving 26 submissions and hearing 11 witnesses, the committee has made a number of amendments to the Bill, both of a drafting nature and on matters upon which witnesses placed considerable emphasis. . . .

. . .

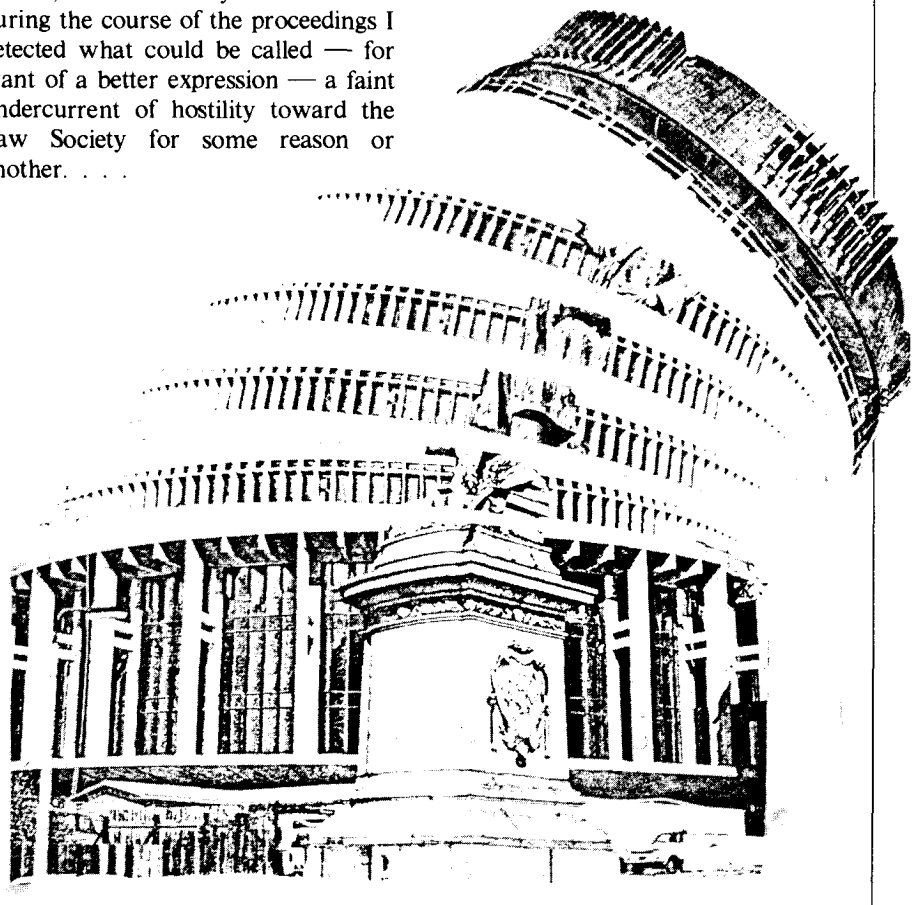
. . . The major, and perhaps only, difference between Government and Opposition members appeared in the consideration of cl 6 relating to the establishment of law offices and legal advice bureaus. Government members believed that the creation of these establishments should be left to the council of the New Zealand Law Society, but Opposition members said that the decision should be left in the hands of the Minister of Justice. . . .

*Mr O'Flynn (Island Bay):* I am pleased to say that generally the Opposition supports the Bill as reported back. As the chairman of the committee said, there is only one provision to which Opposition members are firmly opposed — cl 6 relating to the exemption from requirements of the Law Practitioners Act of community law centres or neighbourhood law offices. I shall say a word about that later. Opposition members of the committee made alternative suggestions from time to time, some of which were rejected, leaving us with what could be described as reservations on some points. In addition, as the chairman and my colleagues on the committee know, I had several reservations, to only one of which the chairman chose to refer. . . .

. . .

In the past I have not always agreed with the Law Society, and I did not agree with everything it put before the committee, but I was left with the impression that some of the proposals or suggestions it made and some of the warnings it gave were correct, and were not fully heeded by the committee. Indeed, I have to say that at times during the course of the proceedings I detected what could be called — for want of a better expression — a faint undercurrent of hostility toward the Law Society for some reason or another. . . .

However, all I want to say is that the society made its great concern about the Bill abundantly plain, and it was perfectly natural that it should. After all, the Law Society and its members are far more intimately concerned with the legislation than anyone else. At the same time, it is pefectly true, and recognised even by the society — which might be regarded by some as a little slow or backward — that the public has an increasing interest in the administration, organisation, and peformance of the legal profession. Legal aid increases that interest, and entitles the Government, as the representative of the taxpayer, to take a



close interest also. There is much more interest today than there used to be.

*Hon P I Wilkinson (Kaipara):* I shall begin with a comment on the reference made by the member for Island Bay to what he called the "detectable undercurrent of hostility" towards the Law Society during the committee hearings. It is equally fair to say that, when it came to matters affecting the internal administration of the legal profession, a great deal of attention was given to the society's views. As I recall, the Bill was the product of about 3 years' consultation with members of the Law Society. During those 3 years many significant changes were recommended and adopted, but obviously some aspects of the Bill went beyond the profession itself. In such areas the Law Society was just one voice, albeit an important one, to be listened to. In fact, both Opposition and Government members of the committee disagreed with the Law Society on two main points — the issue of the "law prac" being compulsory and the issue of administrative requirements for practising barristers.

Considering the range of the Bill, that degree of accord is quite remarkable. Furthermore, Government members not only believe that the creation of community law centres and bureaus should be left to the council of the New Zealand Law Society; they also readily acknowledge the sterling work done in that field by Law Society members. In reply to the observation of the member for Island Bay, it is reasonable to say that the Law Society generally had a fairly good run from the committee. . . .

*Ms Richardson (Selwyn):* I want to conclude by drawing attention to the manner in which the Bill came before the select committee. It came as the product of the New Zealand Law Society. The Law Society lobbied in the most effective way possible, in that it incorporated its ideas and propositions into a draft measure. I commend that lobby practice to the House as a helpful form of representing a point of view. A note of warning should be sounded that lobbying in the form of actually producing a draft Bill should not create the expectation of the lobby group that such a draft will automatically be adopted.

The New Zealand Law Society, of course, had privileges conferred on it that are not normally conferred on witnesses. Its representatives had the ability to sit through the evidence presented to the select committee, the privilege of being able to take notes on the proceedings — an activity normally confined to accredited representatives of the news media and the opportunity to come back to the select committee with their considered assessment of the submissions that had been made.

I do not think that the Law Society should complain that it was not given a fair hearing. I should say that on more than one occasion, as a member of the Law Society, I became concerned that the privilege conferred upon it was becoming a liberty to comment outside the House on attitudes expressed by members of the select committee, and I do not feel that that helped the manner in which the society's representations were received. The committee considered the evidence on its merits, and having addressed itself to a wide range of submissions — not just those from the New Zealand Law Society — the committee is satisfied that it has brought back to the House a Bill that represents a very good blend of the public interest and the self-interest of members of the New Zealand Law Society.

## Legal education

*Mr D M J Jones:* . . . the committee decided not to accept the Law Society's submission to introduce a scheme that has become known as "law prac". The Law Society wished to introduce a compulsory law practical scheme, and the committee has made the appropriate amendment to the Bill to delete that provision. The mandatory nature of the scheme was criticised by submissions, including those from the law deans, the New Zealand law students, and the armed forces legal officers. The committee thought that the Law Society's overall complaint about the difficulty in obtaining changes to legal education had some merit, and that is why alterations were made to the Council of Legal Education and to the powers of the Minister, who can now require the council to report to him in terms of the amendment I have mentioned. There were other reasons behind the changes of course, and I am sure that members will explain them in greater detail as time allows.

*Mr O'Flynn:* It was disclosed that there had been a long-standing dispute between the Law Society and the law schools about what kind of practical education and training could be introduced to meet that difficulty. I got the impression that the Council of Legal Education, which might have been looked to to arbitrate the dispute, had really done little or nothing about it. Therefore, the Law Society felt compelled to put its scheme forward. It failed to convince the committee, so nothing has been done practically to solve the difficulty except for the amendment to cl 37, to which the chairman referred. That amendment takes the form of empowering the Minister to require the council — fortunately, he is empowered to require it — to inquire into, consider, and report on any matter that he thinks fit to send to it concerning legal education. The hope is — and I think the Minister gave some assurance to the committee — that he would ask the Council of Legal Education to look into the matter. I hope so, because unless he does there will be a considerable danger, comparable to the one I referred to about barristers starting on their account, but potentially worse, of people setting up in practice as solicitors as well, when they have inadequate practical instruction and are faced with difficulties and added difficulties in relation to trust accounts and the like.

*Mr Palmer (Christchurch Central):* For the first time a significant aspect of legal education in New Zealand was to be removed from the control of the Council of Legal Education and put under the control of the Law Society itself. The law deans objected to that course in their submission to the committee. It seems to me that the justification advanced to the committee for that course being taken was not adequate, and considerable criticism of it was made by the New Zealand law students and various other groups that appeared before the committee saying that they did not know what would be in those practical law courses. They did not know what they were going to have to do to satisfy the requirements. It was generally thought that the provision was undesirable. After considerable debate and discussion the committee agreed with that view.

The problem remains that the Law Society wanted to cure defects in the practical knowledge and experience of young practitioners. As the member for Island Bay said, the problem remains. The Bill does provide the solution for the problem. If the Law Society, in conjunction with the Council of Legal Education and the universities, can get together and hammer out some changes to the professional course that takes

place for a year after the law degree is completed, the practical difficulties can be overcome. To add another tier to legal education is not an adequate solution to the problem of reforming some defects that may exist in the existing tier. The logic of the committee's decision on that matter is that the Law Society's proposal is not at present acceptable, that there are better ways of achieving the goal of practical legal education, and that those who are responsible should see that it is achieved. In the committee's view, the onus of proof was on the Law Society. It did not discharge that onus of proof, because it is obvious that anyone embarking on a professional education and on professional life has problems at the beginning.

## Legal experience and barristers

*Mr D M J Jones:* The committee also considered the meaning of the expressions "legal experience" or "experience" in cl 54(1) and decided to accept first the submission of the Civil Service Legal Society, which considered that the expression "Government Department" was too narrow. Those words have been omitted, and the words "any of the State services (as defined in s 2 of the State Services Act 1962)" have been inserted. In addition, subcl 1(c) of cl 54 has been amended to make it clear that legal work in an incorporated or unincorporated body can be legal experience, and that experience in full-time law teaching in a university, rather than in a law faculty only, also comes within the ambit of legal experience.

The committee has also agreed to include as a new provision reference to experience as a member of the House of Representatives, although the member for Island Bay expressed a reservation on that point. Again, in cl 54 the committee took the view that the status quo should be maintained, and amended the Bill to provide that a practitioner may commence practice on his or her own behalf as a barrister immediately upon admission to the Bar, without the limitations applicable to solicitors who wish to practise on their own account. The committee also deleted the figure "5" in cl 54(2)(a), and substituted the figure "8". The effect of that change will be, for example, to allow a female practitioner to retire temporarily from practice and raise a child for 5 years without losing her ability to practise on her own account. Members may want to refer to that in future, perhaps not in the House but elsewhere, as the "Ruth Richardson amendment".

*Mr O'Flynn:* . . . I shall come straight to the provisions on which I have reservations, instead of going through the Bill in numerical order. The first is the provision in cl 54(2) which, as put before the committee, proposed that member practitioners should have 12 months' experience in a law office before setting up in practice as barristers on their own account. That was a change in the law. The committee saw fit to retain the existing law, and I feel that it may not have heeded the possible dangers that exist today. It was said that the old law was perfectly all right because barristers have to be instructed by solicitors. It is easy to say that, but it overlooks the fact that that requirement is sometimes unnecessary, as in many legal aid cases, for example. That work is increasing all the time. It is a requirement that can also be evaded — often quite harmlessly — by people who regard it only as a formality.

When one is concerned purely with barristers' counsel work, it is not altogether uncommon to find barristers who ask another solicitor to open a file and formally be an instructing solicitor. There is no harm in that as long as one is dealing with experienced people, but such conduct is also open to the inexperienced. In view of the increasing complexity of all kinds of legal work, and, worse still, the increasing pressures on practitioners — especially young ones — I feel that the decision might be a little risky.

*Ms Richardson:* I want to mention the consideration given in cl 54 to the commencement of practice. This provision attracted a considerable number of submissions, and it is worth traversing those submissions so that members are made aware of the expanding nature of legal practice and the expanding range of occupations performed by people who secure law degrees.

First, submissions were received from the law sections of the universities. Under the Bill as originally introduced, their experience in that work would not have qualified as legal experience. A further set of submissions was received from the Civil Service Legal Society, in which, paradoxically, it drew attention to some submissions that concerned the draftsmen themselves. A submission was then received from a lobby-group lawyer, the lawyer for Federated Farmers, who drew attention to the position of such a person under the legislation. That was followed by the submission of the Wellington corporate lawyers, who again sought to have recognised the kind of experience that they secure in their particular practice of the law. There was a further submission from the legal officers of the New Zealand armed forces, and, again, they sought to have their interests accommodated in the Bill.

This indicates that Parliament is being asked to entertain a very wide range of occupations that involve people with legal qualifications. The select committee accepted that it would

be an anachronism to confine the scope of cl 54 to a traditional range of legal practice, so the Bill as reported back makes it clear that there is an expanded range of activities that will qualify as legal experience for the purposes of commencing practice.

## Discipline

*Mr D M J Jones:* Clause 92 dealing with notification to the district law society by bankers of suspected irregularities on the part of practitioners has been deleted. The committee agreed with the Consumer Council's recommendation that there was no justification for setting a precedent by using bankers as de facto police officers. The committee has increased the number of lay representatives on district disciplinary tribunals and the New Zealand Law Practitioners Disciplinary Tribunal from one to two in each case.

*Hon P I Wilkinson:* . . . Provision is made for lay observers to review action taken by a district law society on a complaint; for the separation of the investigation of complaints, the laying of charges, and the adjudication of disciplinary proceedings; and for lay membership of disciplinary tribunals at both district and national levels. The lay membership provisions recognise the public's interest in disciplinary proceedings, and should considerably boost public confidence in them. At my suggestion the committee, in deliberating, increased lay representation on the disciplinary tribunals at district and national levels from one to two in each case, to give effect to our concern that one lay member in a tribunal could be led by the professionals in a way that two members are less likely to be.

*Mr Palmer:* Many intemperate submissions were made to the committee about the quality of lawyers in New Zealand, and it is my judgment that many of those submissions were not well founded. New Zealand lawyers are as good as any in the world. Because lawyers deal inherently with conflict there is always unhappiness, because there is always a loser in any conflict. The practice of law in New Zealand is a carefully regulated profession, and the submissions received by the committee were directed towards how that regulation could best be achieved. The Bill clearly allows for the rotten apples in the legal profession to be sorted out and removed rapidly, so that the Bill as reported back contains even more safeguards for the public than before.

## Conveyancing monopoly

*Hon P I Wilkinson:* Finally, I shall say something about the so-called conveyancing monopoly enjoyed by the legal profession. The committee agrees, although not without some reservation, that the matter should be further examined. I recall that the Consumer Council made a particularly interesting submission on this topic. At present the profession in effect enjoys a statutory monopoly. As with all statutory monopolies, it is the duty of the legislature to ensure that the user receives adequate protection. How far we should go in encouraging what the Consumer Council described as a "paralegal" tier is a matter that should be considered further.

[The member from Kaipara was reminded that his time for speaking had expired. He accordingly concluded:]
The anti-monopoly proponents did succeed in persuading us that we should not go on acccepting the existing monopoly, but should at least look to see whether the demands at the time require some modification.

*Mr Palmer:* The committee also gave some desultory consideration to the questions of the conveyancing monopoly, which is perpetuated in the Bill. While the Consumers Institute and others submitted that the conveyancing monopoly should not continue, we were persuaded by the submission from the Department of Justice, which stated: "It would be in our view precipitate to alter the present regime without a detailed and comprehensive examination of the issues." In other words, if the conveyancing monopoly in New Zealand is to be altered, it is necessary to examine the alternatives carefully and report on them. Those facilities were not available to the committee, and, despite the fact that several members of the committee favoured doing away with the conveyancing monopoly, it was thought that it would not be practical to accomplish that in the Bill. The House may want to give some consideration in future to how best that can be done.

The committee canvassed a number of possibilities — allowing the Housing Corporation or the Public Trust Office to do the conveyancing, reintroducing land brokers to New Zealand, or wiping out the monopoly and not replacing it. There are difficulties with each solution, and the matter needs much consideration. That consideration may very well be carried out with the comprehensive review of the Land Transfer Act at present being carried out by the Government. Opposition members hope that that review, which was mentioned in the Statutes Revision Committee when that committee considered the Law Practitioners Bill, will make some considerable progress deciding whether that conveyancing monopoly should be continued, and, if so, on what terms, because many of us think that it should be done away with.

## Community law centres

*Ms Clark (Mt Albert):* When reporting back, the chairman of the committee accurately recalled that there had been a significant difference of opinion between Government members and Labour Opposition members on the committee about who should have the authority to approve the establishment of community law offices. At present, the Law Society has the power to determine whether there is an unmet legal need within a community, and whether the establishment of a community law office should be approved to meet that need. The Bill before the select committee did not change that position. Labour Opposition members argued that the Law Society should not be the judge of whether there is an unmet legal need within a community. We have considerable reservations about a quango with a vested interest in the matter making that decision.

The argument of Government members at the select committee for leaving the power with the Law Society appeared to be that, because the society has funded some community law offices and it is expected that it may do so in the future, it ought therefore to be given the power to license the existence of those offices. That view implies that, if the power of the Law Society to license were removed, it might not continue to fund community law offices. I certainly hope that the society would not be as small-minded as that.

Labour Opposition members of the committee argued that the judgment about whether an unmet legal need exists should properly be made by someone impartial in the matter, and our preference was for the Minister of Justice to exercise that judgment. Submissions on that matter were made by the Wellington and Dunedin community law centres. Neither of

them favoured the Law Society having unfettered power over the establishment of community law centres. One suggestion from the Wellington Community Law Centre was that the supervision and encouragement of community legal services should lie with a new legal services commission — a body suggested in a recent paper by the Department of Justice. The Labour Opposition reaffirms that the decision should be made by a neutral body, so it does not propose to support cl 6, which leaves the power with the Law Society.

### Miscellaneous

*Mr D M J Jones:* . . . The committee decided to omit subcl 2(h) of cl 16 requiring practitioners compulsorily to enter a scheme of professional indemnity insurance. This was largely because the society had found an alternative means of implementing its scheme. Two new subclauses dealing with the scheme were introduced in their place.

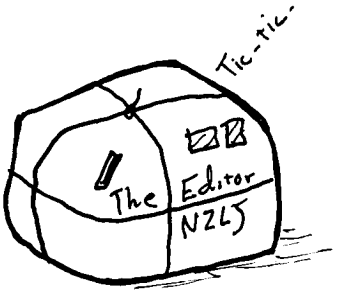
An amendment was made to cl 68 regarding the keeping of a register of trusts, instruments, or wills. The clause will apply only when the solicitor, or his or her firm, prepare the trusts, instruments, or wills in which he or she is appointed as a trustee, and the society's suggestions have been implemented. In addition, the committee felt that it would be too onerous for law firms to go back — in some cases 100 years — to compile such a register that will apply only to wills, trusts, or instruments made before 1 April 1973.

### Conclusion

*Mr D M J Jones:* The Bill, which contains 193 clauses, has been reported back in a clear and detailed way by members on both sides of the House, and I thank those members who have spoken in the debate. The Government has faith in the way in which the New Zealand Law Society has been involved over the past 10 years with the citizens' advice bureaus and the like, and the financial support that the society has given for the services indicates its real interest in providing for the legal needs of the community. Members have indicated the areas of dispute. They have stuck to the reporting back of the Bill, and, in accordance with the traditions of the House, we will have a major debate on the second reading.

*Motion agreed to.*

# Letter




DEAR SIR

I have recently perused the July 1982 issue of *The New Zealand Law Journal* and am prompted to comment upon the changes which have occurred in the *Law Journal* recently.

Looking back over issues of the *Law Journal* of past years I am encouraged that scholarly analysis of difficult areas of the law (I never have found it easy reading) has now given way to rather lighter reading material. I had no trouble at all coping with the intricacies of "The Day Mike Bungay Socked it to Fair Go". When coming to "Unequal Bargaining Power — Bundy revisited" the situation was even better. Having previously had occasion to think long and hard to see *Bundy's* case in its proper context I now appreciate that such tedious endeavours are going rather too far. In the comment you told us of the interesting facts (material facts are rather technical) in *Bundy's* case, dealt with the legal issue by condensing the reporter's headnote and then explained the case which prompted the revisitation by notifying us of its irrelevance. I was able to follow the process, and in a good deal less time than it usually takes to read the best part of two columns of legal writing. Even the humour has been made easier. In the past the cartoons had captions, sometimes displaying such wit that it was necessary to stop and think to fully appreciate the joke. Now that the captions have been omitted there can be no fear of feeling inadequate due to a failure to "get" the joke, one can approach in the confident expectation that there is none to "get". If other legal periodicals were to follow your lead the law would be much easier for us to understand.

My purpose however is not only to endorse these pleasing changes; there is a word of warning to be sounded. You do have a competitor which has been reporting on current issues in our Courts for a long time. I refer of course to the weekly newspaper *Truth*. Both publications do of course admirably select only the issues which their readers wish to be informed of and present it in a thoroughly readable style. *Truth* however has far outstripped you in the little extras which help keep up the circulation. You have managed nothing more than a young woman modelling "the hottest thing in lawyers' fashions". Compare that with your competitor which recently managed such headlines of forensic interest as: "Mr Big's former girlfriend topless" — with an exclusive interview. In the light of such competition I am sure you cannot afford to have young women modelling anything more than a wig if the circulation of the Law Journal is to be maintained at the present level.

Yours faithfully

G D PEARSON
Dunedin

*Dear G D*

*Although we occupy part of the old Truth building, we realise it is impossible to compete with that publication. Butterworths, which publishes NZLJ, acknowledges that being "Publishers to the Professions" does not include "Publishers to the Oldest Profession."*

*Editor*

# The Mortgagee's sale: Part II — Caveats

*S D Walker and J K Guthrie*

*This concludes the two-part series on mortgagee sales.*

## Explanatory note

SINCE this paper was presented the Land Transfer Amendment Bill has been introduced to the House. The Bill is intended to solve the problem discussed by the authors. Its effect is discussed in a postscript.

## The problem

Section 141 of the Land Transfer Act provides:

> "*Effect of caveat against dealings*" So long as a caveat in Form N remains in force the Registrar shall not make any entry on the register having the effect of charging or transferring or otherwise affecting the estate or interest protected by the caveat: Provided that nothing herein shall prevent the completion of the registration of an instrument which has been accepted for registration before the receipt of the caveat.

There has for some time been debate as to whether this section operates to prevent the District Land Registrar from registering a transfer of land sold in exercise of a mortgagee's power of sale. The issue came squarely before Barker J in *Stewart v District Land Registrar* ([1980] 2 NZLR 706 ).

The applicant in *Stewart's* case was the first mortgagee of land near Auckland. A second mortgage was registered and subsequently a caveat in Form N claiming as estate or interest in the mortgaged property by virtue of an agreement to mortgage. The mortgagor defaulted and the first mortgagee exercised her power of sale privately. A Memorandum of Transfer signed by the mortgagee and in favour of the purchaser was duly presented to the Auckland District Land Registrar. The District Land Registrar refused to register this instrument and this litigation (under ss 216 and 217 of the Land Transfer Act) resulted.

The differing arguments presented in the case reflected the earlier debate and the uncertainty that had existed about the true legal position. The District Land Registrar simply asserted that the clear and unambiguous wording of s 141 prohibited him from making any entry on the register, such as registration of a transfer, which would have the effect of "charging or transferring or otherwise affecting the estate or interest protected by the caveat." The applicant argued that s 141 could not operate to require a mortgagee in exercise of the power of sale to remove all outstanding caveats because to do so would have the effect of putting the caveator in a stronger position than is a prior registered mortgagee.

Section 105 of the Land Transfer Act reads as follows:

> "*Transfer by mortgagee*" — Upon the registration of any transfer executed by a mortgagee for the purpose of any such sale as aforesaid, the estate or interest of the mortgagor therein expressed to be transferred shall pass to and vest in the purchaser, freed and discharged from all liability on account of the mortgage, or of any estate or interest except an estate or interest created by any instrument which has priority over the mortgage or which by reason of the consent of the mortgagee is binding upon him.

Because a caveat is not itself an encumbrance or mortgage, but is merely notice of a potential claim, Barker J in *Stewart's* case rejected an argument that s 105 operated to free the land of the caveat.

Until a caveat is substantiated for example by way of a registered mortgage it cannot be regarded as an encumbrance.

Barker J's decision adopts the reasoning of the Supreme Court of Victoria in *Forster v Finance Corporation of Australia Limited* [1980] VR 63. Victoria is of course a Toren's System State and its section which is the equivalent of the New Zealand s 105 appears to be *in pari materia*. In this case Crockett J said:

> The Registrar of Titles cannot register a transfer to the purchaser whilst there are outstanding caveats subsequent to the vendor's mortgage. . . . It is quite impossible for the Registrar to register in the belief that by effecting such registration the caveats will thereby be removed, because "encumbrance" in s 77(4) does not include caveats such as those in this case.

The duty of the mortgagee where a surplus exists following a sale provides a further argument in support of the view that a caveat prevents registration of the mortgagee's transfer.

Section 104 of the Act requires the mortgagee to:

(1) Pay expenses of sale.
(2) Pay the monies then due and owing to mortgagee's or encumbrancers in the order of their priority.
(3) Pay surplus (if any) to the mortgagor.

What is the mortgagee to do in the event of a surplus being in hand after these obligations have been met? Pay the claim of the caveator and thereby place himself in the position of having determined the validity of the caveator's claim? If the surplus is paid to the mortgagor the deserving caveator might be defeated merely because he'd been deprived of the opportunity to test

his claim.

The view of the applicant in *Stewart's* case is supported by a statement in Hinde, McMorland and Sim at para 2.149 which says:

> For example, if a mortgage had been registered prior to the lodgement of a caveat, the caveat would not prevent the registration of a transfer in exercise of the power of sale under the mortgage, for the "estate or interest protected by the caveat" was the estate in fee simple to the mortgage.

This proposition appears to be taken from Jessup, *Forms and Practice of the Lands Titles Office of South Australia* (5th ed, 1973), 293 where it is said:

> . . . it is the practice to permit the mortgagee or encumbrances under a mortgage or encumbrances registered prior to the caveat, to exercise his power unless, of course, the caveat had been lodged against the mortgage or encumbrance in which case the grounds for doing so would have appeared in the caveat.

And from Adams, *The Land Transfer Act 1952* (2nd ed) 349, para 413 of which says:

> This appears to be correct for the estate caveated in such a case is the fee simple less the mortgage, or what under the old system, would correctly be termed the equity of redemption. . . .

The decision in *Stewart's* case renders these statements wrong in law and the mortgagee whose power of sale is frustrated by the presence on the title of a caveat must look elsewhere for a remedy.

## Removal of caveats

That the offending caveat must be quickly removed is obvious. There are three methods of doing so found in the Act.

Section 143 provides:

> *Procedure for removal of caveat*
> (1) Any such applicant or registered proprietor, or any other person having any registered estate or interest protected by the caveat, may, if he thinks fit, apply to the [High] Court for an order that the caveat be removed.
> (2) The Court, upon proof that notice of the application has been served on the caveator or the person on whose behalf the caveat has been lodged, may make such order in the premises, either ex parte or otherwise, as to the Court seems meet.

Section 144 refers to caveats in Form N and is not relevant to this discussion.

Section 145 provides:

> *Lapse of caveat against dealings*
> Except in the case of a caveat lodged by the Registrar in exercise of the powers by this Act given to him in that behalf, every caveat in Form N shall, upon the expiration of 14 days after notice given to the caveator that application has been made for the registration of any instrument affecting the land, estate, or interest protected thereby, be deemed to have lapsed as to that land, estate, or interest or so much thereof.

Section 147 provides:

> *Caveat may be withdrawn*
> Any caveat may be withdrawn by the caveator or by his attorney or agent under a written authority, and either as to the whole or any part of the land affected, or the consent of the caveator may be given for the registration of any particular dealing expressed to be made subject to the rights of the caveator. Provided that where a registrable instrument purporting to give effect to the estate or interests of the caveator is presented to the Registrar for registration immediately following a withdrawal of a caveat previously lodged to protect that estate or interest, the authority of any agent executing the withdrawal on behalf of the caveator need not be in writing.

We assume for the purposes of this discussion that the caveator whose claim is preventing the sale from proceeding has declined to withdraw his caveat pursuant to s 147.

The mortgagee is then left with having recourse to either s 143 or s 145. The latter section requires the presentation for registration of an instrument affecting the land. If, as is invariably the case the registered proprietor is not minded to co-operate with his mortgagee, for example by signing a mortgage for ten dollars, so that there is some instrument capable of registration the mortgage will usually be in the position that the transfer signed in exercise of his power of sale is the first potentially registerable instrument he has. Such a transfer, necessarily only comes into being following the fact of sale by the mortgagee and the potential for delay (if the caveator and the registered proprietor are at odds with one another) is very great indeed.

One might think therefore that the expeditious way of getting rid of that caveat is to be found in s 143. The section contemplates an application at any time be a person having a suitable interest in the land to the High Court for removal of the caveat. The Court upon proof of service of the application on the caveator being given can make such orders, whether ex parte or otherwise as seems fit.

The procedure contemplated by the section "clearly envisages a summary application supported by affidavits" (per Casey J in *Merbank Corporation Limited v Carter* High Court, Christchurch, 16 March 1981 (M638/80)).

Regrettably, there is existing High Court authority for the proposition that an application made pursuant to s 143 before the mortgagee has sold the property which is his security is premature. To quote the relevant paragraph from *Current Law*:

> In this decision Bisson J refused to remove a caveat over the property the subject of a mortgagee's sale. In his view that application was premature. Although a possible purchaser should be given a clear title, equally the caveator should be entitled to the protection of a caveat. On this basis he adjourned the proceedings until such time as the mortgagee's sale had been conducted, thereby allowing either the applicant to exercise his application under s 143 of the Land Transfer Act or the purchaser of the property exercise the procedure under s 145. *MacDiarmid v Burton* [1981] BCL para 28.

This decision was subsequently affirmed in the *Merbank Corporation Case* (supra), where Casey J followed the line of authority culminating in the Court of Appeal decision *Mall Finance & Investment Co Limited v Slater* [1976] 2 NZLR 685 and found that the summary removal of a caveat pursuant to s 143 is proper only where:

(1) It is patently clear that there was no valid ground for lodging the caveat initially or
(2) Patently clear that the interest which originally justified the Caveat no longer exists, or
(3) That the interest protected by the Caveat cannot be preserved under the Illegal Contracts Act 1970.

Clearly a mortgagee will not normally be able to satisfy *before sale* the test in the *Merbank* case where the caveator claims an interest under an agreement to mortgage or unregistered charge.

Accepting then that the combined effect of the decisions in *Stewart* and *MacDairmid*, is that the mortgagee exercising a power of sale where there is a subsequent caveat will not *before* the sale is conducted be able to remove the caveat, what is to be done? We do not claim that this is the only analysis but we suggest:

(1) In a mortgagees sale the duty of removing the caveat rests on the mortgagee because of his implied convenant to give the purchaser a registerable memorandum of transfer. (See *Supplement to Land Law* (supra) para 8.137).

(2) (1) above is so even though the purchaser can use s 145 which might lead to the lapse of the caveat.

(3) A mortgagee exercising his power of sale must bring his application for an order under s 143 after a contract of sale has been concluded because he will not until then be able to ascertain with certainty if there is to be a surplus.

(4) Prior to sale the unregistered mortgagee is entitled to the protection of the caveat.

(5) If after sale the proceeds of sale are such that there is a deficiency after satisfying the registered mortgages then the Court *ex parte* so far as the mortgagor is concerned can be expected to order removal of the caveat.

(6) If there is any surplus and the title to it therefore disputable as between mortgagor and caveator the Court will require the mortgagor and caveator to be parties to the application to enable an order to be made against the mortgagor for the payment to the caveator of the money owing under the unregistered mortgage.

We should note in passing that the position of the mortgagee where there is a notice under s 42 of the Matrimonial Property Act 1976 registered subsequently to the mortgage is slightly different. Applications to remove notices of claims under s 42 are determined on different criteria from those for the removal of Caveats. (See *Rusden v Rusden* (High Court, Auckland, 2 April 1980 (M73/80). Thorp J); and *Ferguson v Ferguson* (High Court, Auckland, 3 July 1980). Both cases being noted in 1980 in ANZ CR 478).

## Postscript

On 22 July 1982 Mr D Jones (Govt, Helensville) said:

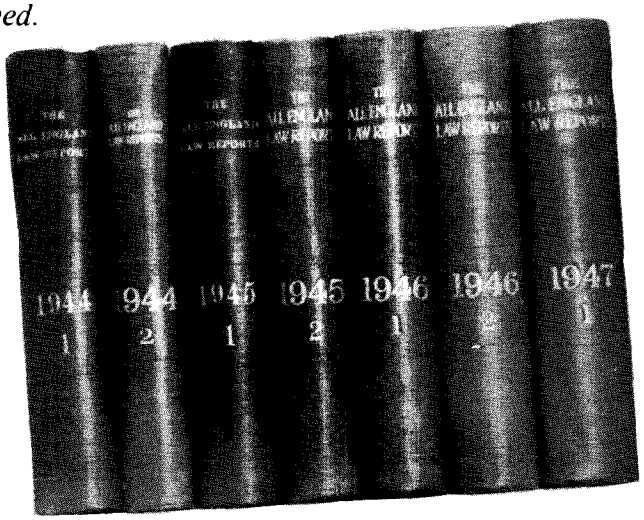
> Members will recall that (this) Bill formed part of the Law Reform Bill, which was reported back to Parliament from the Committee in the last session.
>
> The Statutes Revision Committee has decided to limit this amendment to the narrow aspect of the law which was the point at issue (in *Stewart's* case) that necessitated the amendment. That case related to a caveat registered in terms of an agreement to mortgage. The Select Committee has limited this amendment to caveats lodged after the registration of the empowering mortgage and estate or interests claimed by the caveator arising under an unregistered mortgage or an agreement to mortgage dated later than the date of registration of the empowering mortgage. The original provision related to all caveats, but as the particular defect in the law arose out of a decision that related to an agreement to mortgage and would also have had effect in cases of unregistered mortgages, the Committee has accordingly limited itself to remedying only this aspect.

## Bungay of the month

"I was defending a case in Gisborne. There is a very enthusiastic young prosecutor there named Stapleton. In the middle of his long summation to the jury he complained to Mr Justice Moller that someone on the jury was slumbering. Whereupon the Judge replied "you wake him up, Mr Stapleton, you were the one who put him to sleep." (From a talk given at a Wellington Young Lawyer's luncheon.)

# Being learned in law — the QC qualification quiz

*Following is a brief test of your legal general knowledge, fact and fiction. Instant recall is the key factor and no thinking is allowed.*




1 In the days of Elizabeth I, Queen's Counsel enjoyed a far more personal relationship with their client. Name Elizabeth's most illustrious learned Counsel.
2 Name a lawyer who won an Olympic gold medal.
3 What book did Dickens dedicate to a lawyer?
4 Which English Judge was known as the hanging Judge?
5 The Arthur Alan Thomas saga ranged from District Court to Privy Council. Outline the proceedings, including extra-legal intrusions.
6 Who successfully defended without a leader the accused in the Penge-Bunglow murders?
7 What is Lord Denning's Christian name?
8 What was the final outcome of *Donoghue v Stevenson*?
9 Name three lawyers whose novels are included in standard collections of great books.
10 Meeting up with Rimsky-Korsakov had a permanent effect upon this person's legal studies. Who was he?
11 Who was New Zealand's first woman lawyer?
12 What prerogative can be exercised by a Lord of the realm who is sentenced to death?
13 There is the Scottish verdict of "not proven". Apart from this particular usage, is the term linguistically correct?
14 In the following groupings, indicate the English and American terminology;
   (a) pro bono publico/fee waived
   (b) certiorari/leave to appeal
   (c) rainmaker/club partner
   (d) opinion/speech
   (e) aforethought/intention
   (f) Juris Doctor/Bachelor of Laws
15 Lord Denning's first reported decision is?
16 Name two people who had bad things to say about lawyers.
17 Which Judge was born with the surname, Manningham-Buller?
18 In what Agatha Christie novel does a distinguished Queen's Counsel feature as a master criminal?
19 The *New Zealand Law Journal* in the 1950s featured a columnist known as "Scribble X" Who was he?
20 Who was the perpetrator of the infamous "case method" system of legal education, first introduced at Harvard in the 1870s?
21 Jeremy Bentham's efforts at Law Reform were frustrated by this man, the profession's most noted scholar. Who was he?
22 Shakespeare's protagonist in Henry VI says, "The first thing we do, let's kill all the lawyers." After our protagonist had his day then what happened?
23 Complete this statement: "If all the legal academics in this country were laid from end to end. . . ."
24 Karl Marx intended to write a treatise on law. True or false?
25 In what science fiction novel was it customary for winning counsel to solemnly execute the losing advocate?
26 The Watergate scandal was called a conspiracy of lawyers. Name three lawyer conspirators.
27 Name two lawyers who led revolutions.
28 The legal profession first wore black in mourning for the death of the nation's ruler. They have never come out of mourning. Name the long-commemorated ruler.
29 Some New Zealand families can boast several generations of distinguished lawyers. Identify the following families:
   (a) Father High Court Judge — son QC
   (b) Grandfather High Court Judge — father QC — son Judge's Associate
   (c) Great-grandfather High Court Judge — grandfather QC — father Law School Dean — daughter solicitor
   (d) Ancestor founder of New Zealand's oldest firm — descendant partner in the firm.
30 What is the answer to life, the universe, and everything?

# Answers

1 Sir Francis Bacon. Here was a counsellor truly learned in law — and just about every aspect of acquired knowledge. Scientist, author, philospher, statesman, and historian, some credit him with having written Shakespear's plays. As Attorney-General under James I, he was the leading exponent of the Royal prerogative and was responsible for Lord Coke's dismissal from judicial office. Sir Francis Bacon died of pneumonia after being seized with an inspiration concerning refrigeration: he jumped out of his coach into the cold winter and stuffed a dead chicken with snow.

2 Harold Abraham (*Chariots of Fire*).

3 *The Pickwick Papers*.

4 "Bloody" Judge Jeffries. His Honour had a way with witnesses, eg: "Hold the candle to his face, that we may see his brazen face." and "Thou art a strange prevaricating, shuffling, sniffling, lying rascal."

5 Take a deep breath: (1) District Court for depositions; (2) High Court trial (found guilty); (3) Court of Appeal (dismissed appeal); (4) Governor-General commissioned report by a retired High Court Judge (vindicated verdict); (5) Governor-General referred case to Court of Appeal (ordered new trial); (6) High Court trial (found guilty); (7) Court of Appeal (dismissed application); (8) Governor-General referred case to Court of Appeal again (dismissed the case); (9) Privy Council (dismissed appeal); (10) Pardon, investigated possibility of, recommended, and granted;

An extra point for those who remembered this sequence: (a) Royal Commission to investigate police. (b) High Court review of Commission. (c) Appeal to the Court of Appeal.

6 Horace Rumpole.

7 Alfred.

8 It is not reported. The case never decided if there was in fact a snail in the bottle, but instead came to the House of Lords under the Scottish procedure of an "interlocutor" to determine a point of law. After the legal point was settled, but before the factual issue could be decided Stevenson died. His executors settled with Mrs Donoghue for £100.

9 Sir Walter Scott, John Galsworthy, and Franz Kafka will do.

10 Igor Stravinsky.

11 Ethel Benjamin, admitted in Dunedin early this century.

12 He can demand to be hung by a rope made of silk (so I'm told).

13 No. Prove, proved is the form. Dissenters can take it up with the *NZ Listener*, which published something about the matter some five years back.

14 All the first terms are American. The certiorari/leave to appeal distinction refers to appeals taken to the US Supreme Court/House of Lords; rainmaker/club partner refers to those in a firm who bring in the business; opinion/speech refers to judgments delivered in the Supreme Court/House of Lords.

15 *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130. The case came before Denning J (as he then was) in 1946. He had been a Judge in the Kings Bench Division for some six months (following a stint in the Family Division). The case was not reported in the All ERs until 1956. According to the story, the editor of those Reports thought that some unknown Judge was making bad law and neglected to report the case. Public demand accounted for its eventual inclusion.

16 Almost any two names will do.

17 Viscount Dilhorne, sometimes referred to as "Bullying Manner".

18 *The Secret Adversary*.

19 Mr Justice Leceister (as he was to become).

20 C C Langdell. Jerome Frank noted that this man as a practitioner preferred to skulk around the libraries: "The so-called [case] system. . . was the expression of the strange character of a cloistered, retiring bookish man. Due to Langdell's idiosyncrasies, Law School came to mean 'library law'". Legal education never recovered.

21 Sir William Blackstone. His Commentaries put English common law on the intellectual map and permanently delayed the introduction into England the codified legal system expounded by Bentham.

22 Anarchy reigned and our hero got killed — a lesson to those who think we can get along without lawyers.

23 ". . . I wouldn't be at all surprised." (With apologies to Dorothy Parker).

24 True. After he got through with economics, Marx was going to have a go at the social structure of society, including the legal system.

25 *The Dosadi Experiment* by Frank Herbert (author of Dune). The practice was greatly effective in reducing litigation.

26 Let's start at the top: President Nixon, Vice-President Agnew (who was involved in his own free-lance scandal before Watergate), Attorney-General Mitchell, President's Legal Counsel Dean. The list goes on and on and on.

27 So you think the profession is composed of pillars of society? It is common knowledge that just about every act against government authority has the fingerprints of lawyers all over it. Thomas Jefferson, V I Lenin, Fidel Castro, and Mahatma Ghandi will do for starters. All except Lenin were practitioners.

28 Queen Anne.

29 (a) Henry
(b) Tompkins
(c) Sim
(d) Brandon

30 42.

---

## Scoring

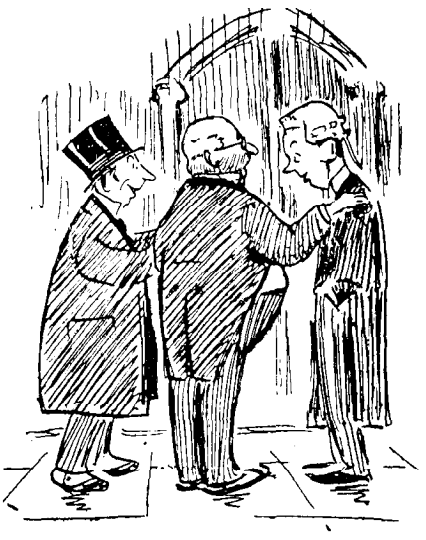
To ascertain your score, compute as if you were disclosing a revolving credit contract. Otherwise, allow one point per question. Add 10 points if you are male and have silver hair.

Ratings: Over 50 percent — You are truly learned in law. Keep on the lookout for a letter from the Minister of Justice.

Under 50 percent — You are probably making too much money to care anyway.

# Forensic Fables

*Greatest hits from the [1928] NZLJ*



## The languid leader and the ducal action

THERE was Once a Languid Leader. He Despised Old-Fashioned Methods and did not Think Much of his Contemporaries. Though the Languid Leader was both Learned and Industrious he Preferred to Pose as a Dilettante. Sometimes he Remarked that he Only Practised at the Bar because it Provided him with a Certain Amount of Pocket-Money. Often he would Say that it was an Old Woman's Job. Shortly after the Languid Leader had Taken Silk a Painful Dispute Arose between the Bogglesdale Rural District Council and the Duke of Agincourt. The Rural District Council Asserted, and the Duke Denied, that there was a Right of Way over his Grace's Best Grouse-Moor. As the Passage of Citizens along the Sky-Line would Absolutely Ruin the Third and Fourth Drives the Duke Consulted his Family Solicitor and a Chancery Action was Duly Launched. The Duke Retained Mr Topnot, KC, the Great Real Property Lawyer, to Present his Claim for Damages, a Declaration and an Injunction. The Rural District Council Delivered a Defence and Counter-claim which Bristled with Law and Fact. Two Days before the Case Came On, Mr Topnot, KC, was Attacked by Influenza and Returned his Large and Well-Marked Brief. Consternation Reigned in the Ducal Camp. The Family Solicitor, not without Misgivings, Approached the Clerk of the Languid Leader. That Experienced Official Undertook that if the Fee were Substantially Increased (as Time was so Short) his Employer would Give the Matter his Close Attention. On the Eve of the Day Appointed for the Trial the Duke of Agincourt, the Family Solicitor, the Managing Clerk and the Junior Counsel Attended at the Chambers of the Languid Leader for the Final Consultation. The Languid Leader had Studied the Brief with Care and Knew the Case Inside Out. But he was not Going to Give the Show Away. He Received the Party with Vague Cordiality and Thought it Well to Mistake the Duke of Agincourt for the Managing Clerk. He then Observed that he had Only been Able to Glance at the Pleadings, and Opined that the Case was about a Cargo of Chinese Pickled Eggs. When this Misapprehension was Rectified the Languid Leader Exhibited no Emotion. After the Junior Counsel had Explained the Outstanding Points, the Languid Leader Yawned and Said he was Afraid he must be Going to the House. The Duke of Agincourt Left the Consultation Speechless with Rage and Indignation. On the Morrow the Languid Leader Delivered a Dashing Speech and Cross-Examined the Defendants' Witnesses into Cocked Hats. When All was Happily over the Languid Leader Received the Congratulations of the Duke of Agincourt with Easy Nonchalance. He Explained that One Case was Much Like Another and that it was Quite Easy to Pick a Thing Up as You Went Along.

*Moral: Keep It Up*

## Young Mr Tittlebat, the leading solicitor and the unexpected victory

YOUNG Mr Tittlebat was Visited One Evening in his Chambers by a Leading Solicitor. He wanted Mr Tittlebat to Take a Brief in a Case which was to be Heard the Next Day. But as the Defendant (for whom Mr Tittlebat was to Appear) had no Defence, would Mr Tittlebat Accept a Fee of One Guinea? Mr Tittlebat, who had Hitherto been Unemployed, Gladly Assented to this Proposal. On Perusing the Papers Mr Tittlebat (who was not without Intelligence) Detected a Flaw in the Plaintiff's Armour. And, Sure Enough, on the Morrow Mr Tittlebat Obtained Judgment with Costs, for the Astonished Defendant. When the Case was Over there was a Scene of Great Enthusiasm in the Corridor and both the Defendant and the Leading Solicitor Insisted upon Entertaining Mr Tittlebat at Luncheon. At a Late Hour he Returned to his Chambers, Flushed with Victory and Refreshments, Satisfied that his Career was Made. Twenty Years Elapsed and Mr Tittlebat, now a Bald, Prosperous Person, Received a Visit from the Leading Solicitor. He did not Bring a Brief with him this Time, but Said he had Just Looked In to Ask Mr Tittlebat Whether he Remembered that Glorious Victory of Twenty Years Ago. The Leading Solicitor Added that he had Often Wondered how Mr Tittlebat was Getting On.

*Moral: Gratitude takes Many Forms*

# The Commission for the Environment — some insights

*Shonagh E Kenderdine, MA, LLB*
*Legal Adviser to the Commission*

IN an editorial entitled "Policy and Planning" [1982] NZLJ 1, Mr Tony Black expressed concern that Cabinet's recent amendments to the Commission for the Environment's Environmental Protection and Enhancement Procedures[1] (EP & EP) effectively cut off the Commission for the Environment as an avenue for influencing Government policy.

Much of the editorial was directed at the Commissioner's Audit function under the EP & EP. It is worth examining whether in fact the Audit is a document which influences policy and whether the Commissioner's functions have been curtailed as a result of events which took place last year. This article will analyse the Commissioner's function under the 1981 amendment to the National Development Act 1979, together with the 1981 Government revision of the EP & EP. Issues will be looked at in the light of the Court of Appeal judgment given late last year by Woodhouse P in *Environmental Defence Society v South Pacific Aluminium Limited* (No 4)[2] together with a brief summation of how environmental "policy" has been treated by the Courts and how far the Courts may be influenced by the policy content of an Audit.

## The Commissioner and the National Development Amendment Act 1981

Section 2 of the amendment amends s 5(3) of the principal Act by omitting the requirement that the Commissioner for the Environment "give his opinion on the environmental implications of the work" in the form of an Audit, substituting a requirement that he "audit the environmental impact report by examining and giving his opinion on the accuracy and adequacy of the report in so far as it relates to the proposed work".

The new section at first glance seems restrictive. The Commissioner, however, interpreted the amendment as restating his function. He said "the focus will change from my opinion on the environmental implications of projects to accuracy and adequacy of the impact report but from our point of view the *process* will be the same" (*Dominion* 4 Sept 81).

Looking first at the old Act, Woodhouse J in *SPA (No 4)* stated at p 11:

> It is said that the report provided by an applicant is merely a starting point and that any remedy in the event of an inadequate report must be at the next stage when the Commissioner for the Environment is to embark upon his audit. It would of course be extraordinary if he were to feel inhibited in the discharge of his own responsibility by the absence of reference in a report to some relevant matter. That consideration is reinforced by the requirement of s 5(3) [before amendment] that the Commissioner consider the environmental implications *of the work* — rather than confine himself to an assessment of the environmental impact report. In that regard he will often derive assistance as well from public representations.[3]

This implies that public submissions help the Commissioner form his judgment on the environmental implications of the work and the question then becomes, what is the significance of public submissions if they relate only to an EIR and not the environmental implications of the work?

It may be noted that s 55(2) of the old Act makes it mandatory to call for submissions "in respect of *it*", that is, the EIR. What in effect the public have already been doing on National Development projects is commenting on the accuracy and adequacy of the environmental impact report of the proposed work as outlined in the Amendment Act. "Adequacy" is defined in the *Oxford Dictionary* (1) Sufficient; (2) Proportionate to needs; and (3) Satisfactory.

Given this definition, if the Commissioner is to comment on the adequacy of an EIR he must consider the environmental impacts of a work — for that, knowledge is essential to an evaluation of whether the EIR is sufficient, satisfactory or proportionate to need.

## The Commissioner, the public and the EIR

The Commissioner stated before the Select Committee last year that the proposed 1981 amendment to the National Development Act did not remove the rquirement to call for public submissions.

> I will apply the environmental procedures in the same way as before. This means that in addition to the contents of the EIR full consideration will be given to the environmental issues raised in public submissions. It is clearly my professional duty to give them full consideration when preparing the audit.

A definition of EIR is set out in the revised EP & EP:

> The process of environmental assessment may determine that an environmental impact report should be prepared. An environmental impact report is a written statement describing the ways of meeting a certain objective or objectives and the environmental consequences of so doing. The statement is to be an objective evaluation setting out clearly and precisely, with appropriate documentation, the environmental consequences of a proposed action and of the alternatives to that action, and ways of avoiding or ameliorating any harmful environmental consequences.

It may be noted that the EIR should discuss "the environmental consequences of a proposed action and of alternatives to that action".

As the Commission sees it the Audit function is a process containing three essential elements:

(1) The EIR put forward by the proponent
(2) The public submissions on the EIR
(3) The independent appraisal by the Commission of the EIR and public submissions on that document together with investigation, consultation and site visits.

The Audit document which is published at the end of the day draws on all three elements.

Woodhouse P lays emphasis on the importance of public involvement in the Audit process for National Development projects. It is the "plain intention of the legislation that members of the public will have an early and sufficient opportunity of informing themselves about their proposed works and their implications for the environment" (CPG). A deficient EIR "would cause the Commission a loss of opportunity to weigh public submissions" (PG). The judgment stresses the importance of the public right to make representations "which could actually highlight omissions in the report and for that reason to be regarded as more important for the flow of opinion in the public interest than attempting to gauge the minimum requirements of an environmental impact report in a particular case" (p 12).

The dicta refute any suggestion that the report need not go beyond discussions of direct consequences to the immediate site of the proposed works. As to secondary and less direct consequences:

> There must be a real and sufficient link between the less direct effects likely to flow from the project works if they are likely to be regarded as relevant (p 10).

And further:

> When assessed against the further construction of another undertaking which alone could give it industrial meaning and with which it clearly would be inextricably involved . . . I should not be dictated simply by artificial geographical boundaries which promote the site specific kind of argument (p 10).

These conclusions appear to have been reached by consideration of paras 12(g) and (j) of the old Procedures (1973) which state (inter alia):

(g) Is the proposal, although not significant environmentally on its own, likely to stimulate further developments which would have a significant environment impact;
(j) Does the proposal create a significant demand on a resource which is or likely to become in short supply?

These guidelines still apply to government organisations in the revised procedures. For both government organisations and private proponents the format of an EIR remains the same and shall acknowledge:

(i) adverse and/or beneficial effects
(ii) primary and secondary effects
(iii) unavoidable effects
(iv) immediate short-term effects
(v) long term effects
(vi) the probability of an effect occurring whether or not any changes are irreversible or will alter or consume an irreplaceable resource.

In each case the magnitude, intensity and significance of the effect is to be assessed and areas of uncertainty (where there is insufficient information for an evaluation) identified.

The Audit has been redefined however and paras 34 and 35 are worth recording:

34 An environmental impact audit is the document providing an independent opinion from the Commissioner for the Environment on the *environmental implications* of the proposal described in an environmental impact report. In general it will note and verify the information in the environmental impact report and where necessary provide additional information and make any comments as are appropriate. . . .
35 In preparing its Audit the Commission for the Environment may seek such further expert advice as it considers necessary. It is to take into account any representations made by the public as are appropriate.

In the final analysis the Commissioner has to decide what submissions are appropriate for his Audit commentary. Many are of a detailed scientific nature; very few may be termed frivolous or vexatious. In "verifying" information he has to establish its "truth" and "correctness". One must conclude that while his function is to audit the environmental implications of a proposal, his discretion remains a very broad one.

## The Audit and "policy"

In environmental management, policy issues may roughly be delineated as wise use (which incorporates end use) national benefit and the wider environmental implications of the cost-benefits of proposals. The new procedures have brought about one significant change to the content of an Audit. The Commissioner will no longer look at the "*wider economic implications of the work*"[4] nor will he look at the economics of alternative resource use.[5] Such a restriction runs contrary to world-wide trends of environmental management. The Assistant Commissioner of the Ministry of Works and Development, Robert G Norman, in his Presidential Address to the New Zealand Institute of Engineers (8 Feb 1982), drew attention to this question:

> There [is] on the international scene a much more mature attitude to the whole question of environmental activities. As long ago as Stockholm in 1972, . . . pleas were made to look at the *whole* cost of a project, including the burdens on both the developers and the community arising out of waste disposal. It was demonstrated at that time that better design and plant operation would cost less than the environmental problems consequent upon their absence. It was interesting also to note the strength of the arguments made that economic, social and environmental parameters are all wrapped up in the problems and cannot be dealt with separately. This is in marked contrast to some attitudes in the New Zealand scene, where political expedience tends towards deeming those issues to be mutually exclusive. All I can say is that any contrived system of environmental management which excludes social and economic aspects is bound to fail. . . . on the economic side the situation is quite clear. Different options will have different environmental effects, and they will impose different costs on

> all concerned. To isolate these parameters, and then expect the right choice to be made, is patently absurd.

Meanwhile in the absence of white papers where debate on use of a resource might be aired, "*environmental implications of the work*" opens up to the public the Audit as a forum for pursuing its concerns on "*end use*" and "*wise use*" of that resource and is it to the "*national benefit*". The *Maui Audit* (1974), *Auckland Thermal 1 Power Station* (1975), *Upper Clutha Audit* (1975) *Broadlands Geothermal Power* (1977), *Clyde Power Project* (1978) *Karioi Pulp Mill* (1976), *CSR Baigent Pulp Mill* (1980) all reflect these concerns. The Commissioner's final conclusions reflect the analysis undertaken by his staff of such matters and the weighing and balancing tests that are applied. In the *Synthetic Fuels Audit* (June 1981) the Commission flagged, for example, the rate of resource use, degree of import substitution and the high lead content in New Zealand petrol, "whilst acknowledging the strategic significance of the proposed synthetic petrol plant and the short-term benefit it provides by way of a fuel which on commissioning of the plant could be immediately incorporated into the fuel distribution system to supply the existing transport fleet". Such matters arise from "environmental implications of the work". The revised EP & EP contains a provision "that comments received in public submissions on aspects of the proposal which relate to policy questions will be referred to the appropriate Government Departments or local bodies". It is unclear what should happen to them then.

## The Audit, the Courts and "policy"

*SPA (No 4)* makes note of the fact that there is no indication in the Act that the Audit should go before the Tribunal. It also notes that the National Development Act 1979 has carefully made provision for adequate assessment of the environmental implications of major works and it states:

> It would be remarkable if the legislative attention which has been given to these matters were to end with an Audit by the Commissioner which could then be ignored on all sides. At the least its purpose would include the use to be made of it by persons appearing and making submissions before the Tribunal (p 18).

Certainly the Commissioner and members of the public appearing before the Tribunal make use of the Audit as background for submissions, but under NDA hearings those can only be confined to the narrow environmental issues relating to the consents sought — air emissions, noise, waste discharge, site. Section 3(3) of the Act effectively precludes any legal analysis of the policy behind a project on the fast track. The Court of Appeal in *EDS Inc v South Pacific Aluminium (No 2)* [1981] 1 NZLR 153, 157 commented that:

> To a large extent the Act states the policy and empowers the Governor-General in Council to decide whether the work or a decision is essential for the purposes of that policy. For instance the Act recognises that the major expansion of exports and the development of significant opportunities for employment are desirable goals or policies.

The legislation also assumes that a project comes under the NDA because it will promote New Zealand's self-sufficiency in energy and the orderly production and development of New Zealand's resources.

In the matter of an application by *New Zealand Synthetic Fuels Corporation Limited* (1982) 8 NZTPA 138, 151, the Chairman of the Planning Tribunal, Judge Treadwell, discussed s 9 of the National Development Act.

> The effect of subs (1) of that section is that in deciding whether or not to recommend that the planning consent sought should be granted, the Tribunal is to take into account the matters that would have been taken into account if the applicant had applied in the normal way. Subs (2) reads:
>
> > The tribunal shall not be concerned to inquire into the criteria set out in s 3(3) of this Act.
>
> The question whether or not a particular work is essential for the purposes of one or more of the objectives described in s 3(3)(a) is a question of broad national policy for which the Governor-General in Council is the appropriate respondent. It is not a question which it is the proper function of this Tribunal to determine. The Tribunal is not qualified to determine such general issues of national policy, nor would it be constitutionally appropriate for it to venture into the question after the Governor-General in Council has reached a conclusion on it in relation to the specific work pursuant to statutory authority, and given effect at that decision by the formal action of issuing an Order in Council.

The Judge in *SPA (No 4)* observed (at p 17):

> that taking into account the importance of the issues that could be raised by the Commissioner in his Audit there could at least be no objection to the tribunal as a matter of discretion taking those matters into account *when preparing its report*.

The Court herein appears to be taking account of the Tribunal's dual role under the National Development Act — that it acts as a Planning Tribunal under Part VIII of the Town and Country Planning Act 1977 but that it also conducts "an inquiry into the matters relative to the consents set out in that application".[6] "*Relative to*" *is defined in the Concise Oxford* as "*bearing on or pertinent to*" — and apart from determining where the environmental implications of an EIR finish and policy begins, there are practical evidential problems involved in using the Audit to achieve this. Whilst some of the grounds set out in *EDS and Cheviot County Council v MOW and NWASCA* (1976) 6 NZTPA 49 are probably not valid for national development projects, the untested way in which some sections of a report is prepared may affect the weight a Tribunal would wish to give it.

On the subject Judge Treadwell in the *NZ Synthetic Fuels* case stated, "any conclusions contained herein must be proved in the normal way by a witness with knowledge of and expertise concerning these matters. The same comment applied to the Environmental Impact Report" (p 144).

The one stop consents shopping list of National Development applications discourages effective participation in policy planning behind the application. The only real point of challenge to policy is where the proponent's application is referred to the local territorial authorities and regional water board within the district it is proposed the work be situated.[7]

However the Taranaki experience demonstrated that the time allowed the

local councils by the Minister for National Development to make any effective in-depth analysis of the economic and environmental issues such applications require, was very limited indeed. Nor is the Audit then available to the decision-makers. It is questionable also whether the councils currently have sufficient funds or expertise to conduct such studies. As counsel for one of the appellants submitted in *Smith v Waimate West County Council* (1981) 7 NZTPA 241, 249:

> It is inherently unlikely that matters of the kind mentioned (ie economic appraisal) should have been intended to be decided by local authorities especially when matters of national importance are involved. Local authorities are neither qualified or (sic) appropriate bodies to determine national issues of resource use. They must recognise and provide for wise use in the context of their local functions accepting where appropriate decisions of other authorities acting within their proper spheres.

The Courts clearly recognise the policy content of *"wise use"* and so far have declined to give it a broader meaning. Judge Turner debated the issue in *Re an Application by Petralgas Chemicals* (1982) 8 NZTPA 106, 109:

> The TCP Act creates control over the use and development of land only, and does not authorise control over the use of raw materials and resources generally, once they have been won from the land. Planning schemes must be drawn up in a way which (inter alia) will allow the general resources of the district or region to be used and managed wisely. But the powers conferred by the TCP Act cannot be used to direct how resources shall be used once they are no longer part of real property.

Such an approach was endorsed by Judge Sheppard in *Chelsea Investments Limited v Waimea County Council* (1982) 8 NZTPA 129, 133:

> The Town and Country Planning Act regulates the use of land not the use of resources generally. A council cannot control by its district scheme the use that is made of forest products. The scope of the references is s 3(1)(b) and s 4(1) of the Act to the wise use and management of resources must be read in that context and we do not interpret them as requiring or authorising a council (or its tribunal on appeal) to enquire into and make statutory decisions based upon, the relative merits of various uses which might be made of resources such as forest products.

Under NDA only the processing of the resource is examinable by the Courts. Its extraction and "use" would come within policy. On non-NDA projects "end use" is being currently determined by the Courts.[8]

On the whole however the public are legally and practically powerless to determine "use" and the Audit remains an outlet for public concern but is not a mechanism for resolving issues effectively.

## Conclusions

In spite of the redefinition of the Commissioner's Audit function under the amendment to the National Development Act and in the revised EP & EP the Audit function remains the same.

However, to what exent the Audit document influences policy decisions is unclear.

Despite the status accorded it in the National Development Act 1979, the Audit of NDA projects is not a process which is sufficiently integrated into the planning process to be widely and fully utilised by the decision-makers. The public must therefore increasingly see the Audit function under that Act as one, where in part, review of the environmental implications of a work is merely to legitimise decisions already taken or to merely assess the narrow environmental consents sought.

Audits apart from the NDA process will have variable influence. The *Poor Knights Islands Marine Reserve Audit* has laid some of the groundwork for the proposed Marine Reserves Amendment. The *New Zealand Vinyl Ltd Marsden Point Poly Vinyl Chloride Audit* drew attention to the health hazards of the project and may have contributed to halting it. The *NZ Steel Rail Line Audit* has put before the decision-makers alternative technologies whilst choices are still to be made.

The revised EP & EP admonish departments "to bear in mind that for certain major projects with substantial environmental impacts more than one environmental impact report might be appropriate."

The Commission in explaining the environmental impact assessment process may in future advocate several steps as desirable for major projects which may be documented so that alternatives can be fully examined whilst options are still open and so that planning and resource issues are fully canvassed before and not after the event.

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1 Commission for the Environment 1981 Revision.
2 (CA 114/82 (unreported)).
3 Note that the National Development Act 1979 does not define environmental impact report.
4 *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172, 177.
5 EP & EP 1981 p 11.
6 Section 7(1) of the National Development Act 1979.
7 Supra note 6.
8 *Keam v MOW and National Water & Soil Conservation Authority* (CA207/81) and *Gilmore and Others v National Water & Soil Conservation Authority and Minister of Energy* High Court, M183/81).

# Contract, tort, and contributory negligence

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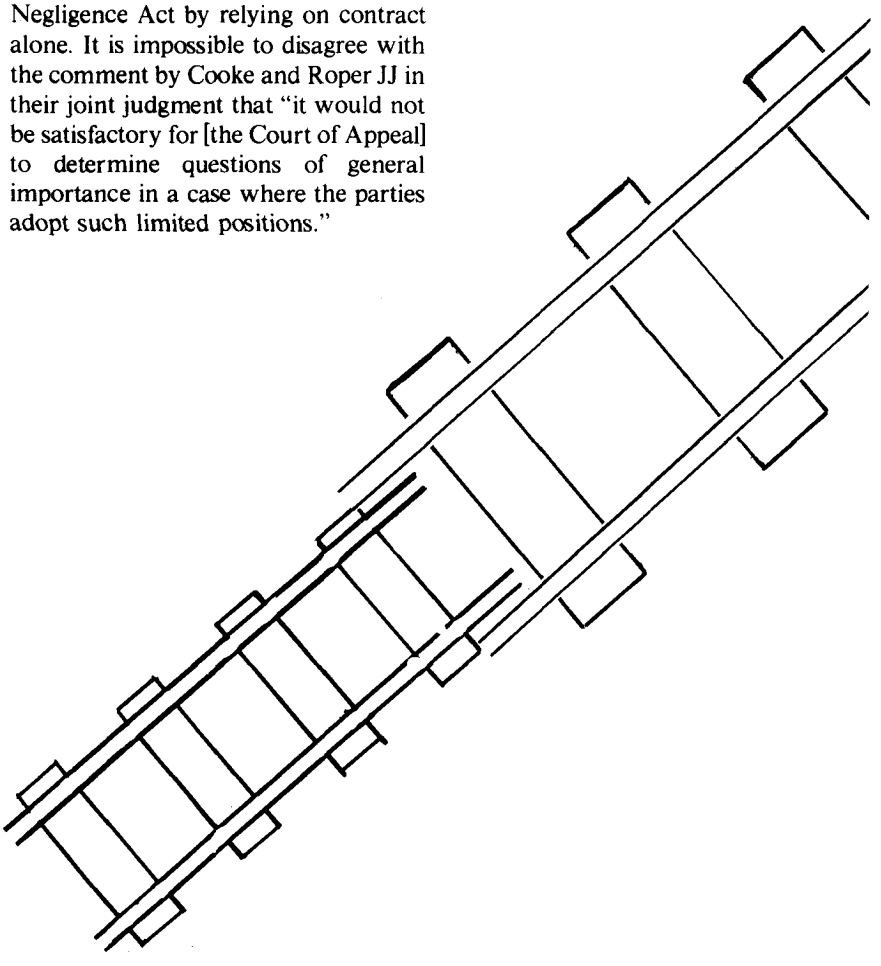
*Readers are referred to Sutton and Mulgan's article in [1980] NZLJ 366 for further insights into the problems arising from the rule in McLaren Maycroft.*

IT is a truism that to ask the wrong question is to invite the wrong reply. By the same token, he who looks in the wrong direction is the less likely to appreciate the fullness of the view. Yet, sadly, these are traps into which we all fall, lawyers no less than other occupational groups. Sadly, too, when the subject matter is the common law, all too often it is the common law which is thought to need adjusting. The point is illustrated, the present writer believes, by two related problems presently engaging the common lawyers of this country. One is the question whether the parties to a contract can recover from each other in tort. The other is whether the Contributory Negligence Act 1947 enables apportionment of damages on a claim for breach of contract.

Both questions came before Prichard J in *Rowe v Turner Hopkins & Partners* [1980] 2 NZLR 550, a case in which a client of a firm of solicitors claimed damages for alleged negligent advice concerning the client's rights as joint owner of a house property. Having held that the advice was negligent, the learned Judge had to consider whether the client's claim lay in both contract and tort and, if in contract only, whether damages might be reduced in proportion to the contributory negligence of the client. Prichard J held himself bound, on the authority of the Court of Appeal in *McLaren, Maycroft & Co v Fletcher Development Co Ltd* [1973] 2 NZLR 100, to hold that the claim could lie only in contract. That being so, he concluded on the basis of a line of Australian decisions, and on his own interpretation of the Contributory Negligence Act, that he had no power to apportion damages between the parties.

On appeal, the Court of Appeal (Cooke, McMullin and Roper JJ) has now, by judgments dated 2 June 1982, reversed the decision of the lower Court upon the ground that, on the facts, the defendant firm of solicitors had not been negligent. Since that disposed of the appeal, the Court had no need to decide either of the other questions raised at first instance. And even had the appeal gone differently on the facts, it was apparently not one in which these other questions had been thoroughly canvassed. Counsel for the appellant had not been prepared to argue that a client could sue his solicitor in tort, while counsel for the respondent had conceded that a plaintiff, entitled to sue in negligence both in contract and in tort, could not avoid the Contributory Negligence Act by relying on contract alone. It is impossible to disagree with the comment by Cooke and Roper JJ in their joint judgment that "it would not be satisfactory for [the Court of Appeal] to determine questions of general importance in a case where the parties adopt such limited positions."

Nonetheless, Cooke and Roper JJ did venture a few comments on these two questions. The significance of these comments (and the factor which gives this case such importance as it has) lies perhaps less with their content than with the appearance they give of a tentative paving of the way to a change in the law at some later opportunity. Their Honours requested that, in cases



like the one before them, trial Judges indicate what apportionment they thought appropriate in case a change in the law be made. They also added:

> On the Act it would therefore not be right to do more in this particular case than refer to the view that it can apply wherever negligence is an essential ingredient of the plaintiff's cause of action, whatever the source of the duty. In disposing of this appeal on the facts only we should not be taken necessarily to assent to the narrower view of the Act reached in the judgment under appeal.

As to *McLaren, Maycroft*, their Honours commented:

> Obviously what was said there, about the relationship of professional man and client being contractual only, requires at least reconsideration to the light of such House of Lords cases as *Sutcliffe v Thackrah* [1974] AC 727 and *Arenson v Arenson* [1977] AC 405 and other English authorities collected and applied in *Midland Bank v Hett, Stubbs & Kemp* [1979] Ch 384 and *Ross v Caunters* [1980] Ch 297. In the meantime it is equally plain that, in the field of professional negligence, trial Judges should apply the law as stated in *McLaren, Maycroft*. . . .

For his part, the third member of the Court, McMullin J, observed that *Bagot v Stevens Scanlon & Co Ltd* [1966] 1 QB 197, on which Richmond J had rested his judgment (with which the other members of the Court had concurred) in *McLaren, Maycroft*, had not been followed in subsequent cases in England in recent years. "In the result" he concluded, "the door which the *McLaren, Maycroft* approach might have suggested was firmly closed may now be thought to rest ajar. Whether it is to be opened, and to what extent, to admit concurrent liability in contract and tort must await further argument in this Court."

## Concurrent liability

When the opportunity does arise for reconsideration of *McLaren, Maycroft*, one of the first points likely to emerge is that in the four cases mentioned by Cooke and Roper JJ there is nothing whatever which would compel or, by itself, even justify any change in the position taken in *McLaren, Maycroft*. Of the two House of Lords cases, *Sutcliffe v Thackrah* (supra) was a claim in contract between a building owner and his architect. Double liability was not in issue. *Arenson v Arenson* was a claim solely in tort, there being no contractual nexus between the parties. Again, no question of concurrent liability could arise. Of the two other cases, both at first instance in the Chancery Division, *Ross v Caunters* was also a claim in tort alone, there being once again no contract between the parties. Only in the *Midland Bank* case was the question of concurrent liability in issue. Oliver J held that the solicitor in that case could be liable to his client both in contract and in tort, a perhaps understandable finding since he was bound by the decision of the English Court of Appeal in favour of concurrent liability on rather different facts in *Esso Petroleum Ltd v Mardon* [1976] QB 801. But of course, neither that decision of the Court of Appeal, nor the later one to similar effect in *Batty v Metropolitan Property Realisation Ltd* [1978] QB 554, is binding in this country. Nor is it yet certain that these cases would be approved by the House of Lords.

On the other hand, none of this says anything about whether a change in the law would be desirable on its own merits. Nor, of course, does any of it make change actually impossible. In their joint judgment, Cooke and Roper JJ made the interesting comment that what was said about double liability by Richmond J in *McLaren, Maycroft* may not have had the concurrence in all respects of the other two members of the Court. There is, too, the further fact that, it having been held in *McLaren, Maycroft* that there had been no negligence, what Richmond J said about concurrent liability was plainly unnecessary to the Court's decision (though it needs to be added that it could be regarded as having been an alternative ground for allowing the appeal). But there is another possibility. It is that *McLaren, Maycroft* may have been right on its facts but that its application ought to be seen as somewhat narrower than may have been thought to be the case.

*McLaren, Maycroft* creates a difficulty only if it is taken to mean that the mere presence of a contract between the parties makes it impossible for either to recover from the other on a tort arising from the same facts. If that is the view adopted, the Courts are placed in a dilemma. On the one hand, the fact that the books contain many examples of concurrent liability makes it extremely difficult to maintain that the mere presence of a contract ought properly to prevent a suit in tort. On the other hand, if the other view is taken and the presence of a contract is seen as irrelevant to the existence of liability in tort, a great many contract lawyers would think it strange indeed that the solemn agreements of contracting parties should be set at naught by the unilateral decision of one of them to bring his claim in tort. The truth is that the apparent dilemma is, and must be, a false one. It arises because the wrong question is being asked. If the matter is approached as one of principle, the dilemma simply disappears.

As a matter of principle, the first question to be asked in cases of potential double liability is whether, apart from the contract, an action in tort could lie. If the answer is affirmative, the presence of a contract should not prevent an action in tort unless the parties intended that it should. Ordinarily, such an intention does not have to be a contractual one. But where there is a contract, the answer should lie primarily in its construction, the contract in this respect acting like a global exception clause. That does not mean that every case need be decided according to the more extreme manifestations of the *contra proferentem* rule. There is adequate authority for saying that, where a contract covers the very ground in which some other form of liability would lie, the contract should prevail. Thus, an exclusion of liability in "negligence" covers want of care both in contract and in tort. And the implied warranty of seaworthiness is displaced by a term affirmatively delimiting the shipowner's responsibilities for the fitness of his vessel. Moreover, there is also adequate authority for treating commercial cases rather less strictly than those at the consumer level.

It needs to be emphasised that the dictum of Diplock LJ in *Bagot v Stevens Scanlon* (supra), upon which Richmond J relied in *McLaren, Maycroft*, was itself based on a passage from the judgment of Greer LJ in *Jarvis v May, Davies, Smith, Vandervell & Co* [1936] 1 KB 399, 405 in which that learned Lord Justice stated:

> The distinction in the modern view, for this purpose, between contract and tort may be put thus: where the breach of duty alleged arises out of a liability independently of the personal obligation undertaken by contract, it is tort, and it may be tort

> even though there may happen to be a contract between the parties, if the duty in fact arises independently of that contract. Breach of contract occurs where that which is complained of is a breach of duty arising out of the obligations undertaken by the contract.

It is essential that passage be seen in its context. The appeal in the *Jarvis* case was on a question of costs in the County Court and turned on whether the claim had been in contract or in tort. It had been expressed to be for breach of contract but counsel argued that a claim for breach of contract could be brought in tort, and had been in the instant case. The argument seems a very odd one to us now, but at the time it did have at least some warrant in legal history. The answer given by Greer LJ was simply that a claim for breach of contract had to be brought in contract, not in tort. There had been no argument addressed to him that a tort duty would have existed had there been no contract. This, after all, was 1936 when the implications of *Donoghue v Stevenson* had still to be explored and realised. There could be no suggestion whatever that the learned Lord Justice was laying down that the mere existence of a contract would extinguish duties in tort which would otherwise have applied. If this analysis is correct, the passage from the judgment of Diplock LJ must be seen, to say the least, as somewhat flawed. But at least one sentence might be taken as relevant to the question actually raised in such cases, namely, did the parties intend their contract to substitute for any duty which would otherwise have arisen in tort? The sentence reads "The complaint that is made against them is of a failure to do the very thing which they contracted to do." It is perhaps in just such circumstances that parties would intend their contract to constitute the whole of their relationship. If so, that could well provide a sufficient justification of *McLaren, Maycroft* on its own facts.

To sum up, it is submitted that the answer to the problem posed by *McLaren, Maycroft* ought in principle to be that the existence of a contract will displace the parties' rights of action in tort only if that was the result the parties intended. Ordinarily, that will be a matter to be determined on a proper construction of the contract.

## Contributory negligence

The other question left open by Cooke and Roper JJ was whether damages in contract can be apportioned under the Contributory Negligence Act 1947. Here, it is believed, the difficulty lies not with the question itself but with the direction in which to look for a solution. The problem arises because, apart from statute, the law does not in general allow apportionment of liability in cases where the acts or omissions of more than one party have combined to produce a single or indivisible loss or damage. It is, of course, a problem which can arise as readily in contract as in tort. The first question, then, is how far the Contributory Negligence Act altered the previous law. The key to the answer to that question, as Prichard J saw, lies in the definition of "fault" in s 2 of the Act, which is in these terms:

> Fault means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would apart from this Act, give rise to the defence of contributory negligence.

The first part of this definition is very clearly confined to liability in tort. The second part too, is just as clearly confined to tort since, before the Act, contributory negligence was a defence restricted to tort claims. There were good conceptual reasons why this should have been so. The defence required a potential victim to take care for himself after the commission of a potentially tortious act until the point when loss or damage occurred. At that point, a right of action arose and the contributory negligence "duty" was displaced by that of mitigation. In the case of contract, which is actionable without proof of loss or damage, the whole of this period would have been subsumed under the (so-called) "duty" to mitigate. So far, the differences may be little more than of nomenclature, though it should be noted that if the victim of a breach of contract were to be impressed with "contributory negligence" on the basis of his failure to mitigate, the application of the Act would no doubt also have to be enlarged to encompass the failure of the victim of a tort to mitigate his loss. But the contributory negligence defence also required the injured party to take precautions against the possibility of a tort even *before* the commission of the wrongful act. By contrast, it is no defence to a breach of contract that the injured party acted on the basis that the contract would be performed, however careless of his own interests that might seem. This means, therefore, that the conceptual framework of the Contributory Negligence Act is foreign, and inappropriate, to contract claims. That is hardly surprising, since the Act was almost certainly a response to the rising incidence of road accidents and the rather unreal consequences in such cases of applying the "last opportunity" rule. In such a context, it is unlikely that contract claims would have been in the minds of the legislature.

The dictum of Cooke and Roper JJ in the *Rowe* case suggests that the Act might apply wherever negligence is an essential ingredient of the plaintiff's cause of action, whatever the source of the duty. It must be assumed that the reference is to breaches of a contractual duty of care, rather than the careless performance of an absolute promise or warranty. In the latter case, the fact that the contract breaker had been careful would be irrelevant to his liability for breach. No reason was advanced by their Honours for interpreting the Act in this way. It cannot be because of the appearance of the word "negligence" in s 2 since the negligence there referred to has to be of the kind that gives rise to a liability in tort. Perhaps the argument would be that, if a claim would otherwise lie in tort for negligence, the mere fact that the acts complained of were also a breach of contract would not prevent the application of the Act to that claim. But that presupposes the contract has not displaced the duty in tort. And while it may explain why a claim in tort may be subject to apportionment, it does not, except in a circular way, explain why apportionment should apply to any collateral claim in contract.

It is submitted that the proper answer to the admitted problem of apportionment lies not with judicial reinterpretation of the Contributory Negligence Act but with amending legislation. The conceptual framework of the Act was dictated by its intended application to claims in tort. Contractual rights are in many respects different from those in tort. The Act in its present form is not geared to take account of those differences.

As it happens, the problem has already been referred to the Contracts and Commercial Law Reform Committee. It is perhaps not unreasonable to hope that remedial legislation will not be too long delayed.