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The Privy Council, law reform, and things that go bump in the night

LONG-TIME critics of the Privy Council will be pleased to note that action may finally emerge on the great "to be or not to be" debate. There has probably been consensus concerning the abolition of appeals to the Privy Council for a number of years, but making that conclusive break with the colonial past has produced cases of cold feet in both the reformist and traditional camps. The recent Privy Council decisions in *Reid v Reid* and *Lesa* have rekindled the debate, with all parties crying for action, albeit for different reasons.

The core issue concerns the trend of British colonies toward self-determination, begun by the settlements along the Atlantic seaboard in 1776 and brought to a near conclusion in twentieth-century constitutional agonies between the Queen and her many and widely scattered imperial possessions. On a commonsense level, the issue seems self-evident. Dr Martyn Finlay, when he was Attorney-General, presented a paper to a Law Conference in Fiji in 1974 in which he questioned the need for appeals to an outside tribunal, noting that nations have laws singular to themselves, not only in custom but in the trend towards codification where statutes are often unrelated to the common law. Speaking for New Zealand, Dr Finlay observed that "the Court of Appeal is perfectly capable of acting with distinction as a final tribunal of law. To say that there is need for a further appeal . . . is to imply that our Courts administer an inferior brand of justice . . . or . . . that its judicial determinations fall short of total acceptability." Nevertheless, sentiment prevailed and for several years the issue lay dormant.

Reid v Reid revived the issue. In that case, the Privy Council declined to act as an appellate tribunal after putting both parties through the trouble and expense on the assumption that it was. According to Their Lordships the case at hand was "a matter of discretion in which the Court appealed from is much more favourably placed than Their Lordships to consider the relevant local considerations. . . ."

The *Lesa* case a couple of months later came as a shock, if only because against all expectations, the Privy Council in an about-face acted as New Zealand's highest appellate tribunal. Their Lordships overturned the Court of Appeal on a decision that was not controversial until the final outcome (again against all expectations). The cry of "abolish" became so unsettling that New Zealand Law Society President Bruce Slane felt obliged to caution against the sudden outbreak of enthusiasm.

Now that the Privy Council's days seem numbered, one can ask whether there are any constructive means to improve our own system. Should we merely treat the abolition of appeals to the Privy Council as a simple amputation, or should we be thinking of other ways of revitalising our law-making system? On this, Finlay deserves the last word:

> On reflection I am inclined to think there is more to be said for a two-tier appellate system rather than three, provided it is coupled with efficient scrutinising machinery, such as a law reform committee, which can examine judgments and if they have unsatisfactory results, recommend remedial measures to Parliament, expressed, for preference, in draft bills. This would free the common law from the fortuitive artificiality which must restrict and distort its unaided growth. Left to itself it has to await the arrival of an ideal set of facts through which a developing principle may be applied and extended. Seldom do they arrive — or arrive in time — and cases with facts falling short of the ideal must be seized on and the principle moulded about them. A revisory body seized with the task of evaluating all obiter dicta could set the pieces into a legislative pattern more neatly and efficiently than the common law wrestles with its jigsaw.

John McManamy

Case and Comment

Sale of land — equitable principles

THE sale of an undivided piece of land from which two companies operated with an identity of management created the problems considered recently in *Te Rama Engineering Ltd (in liquidation) v Shortland Properties Ltd* (High Court, Christchurch. 17 June 1982 (A 384/76) Casey J).

The relevant facts were these: A Co and B Co were incorporated in 1969 with the same secretary (Mr Ashton) and principal shareholders (Messrs Hay and Atherton). These two companies together intended taking over the motor engineering business of C Co. A Co was to conduct the general engineering work, while B Co concentrated on reconditioning. To this end these two companies, which operated from separate workshops on land owned by the shareholders of C Co (Mr and Mrs Downes), agreed to buy that land as well as the business of C Co itself for $58,000, payable by monthly instalments, almost the entire sum being secured by debenture.

In June 1970 B Co went into receivership. The receiver appointed was Ashton, the secretary of A Co and the erstwhile secretary of B Co. Ashton, therefore, still controlled the finances of both companies. The receivership went "moderately well" with regular payments under the debenture being contributed by both companies.

In 1974 two developments occurred. First, Atherton sold his shares in both A Co and B Co to Hay. Secondly, at about the same time, Hay and Ashton decided to extend the existing workshop of A Co (erected on the land being purchased from the Downes by B Co). The extensions were funded solely by A Co at a cost of slightly over $20,000. Casey J found that both of these arrangements were known to Downes.

In 1975 A Co went into voluntary liquidation.

At this point Downes offered to buy Hay's shares in B Co and take over all the debts of the receivership, acknowledging that the acquisition of those shares would mean that "he would have to pay for [the extensions to A Co's workshop] in the long run". The share transfer took place on the same day as the liquidation for a consideration of $500. Meanwhile, Ashton, as receiver, had accepted an offer of $57,000 for the property, telling Downes that it would net sufficient to pay B Co's debts and satisfy the "moral claim" of the liquidator of A Co in respect of the $20,000-plus spent on the extensions. Downes responded by terminating Ashton's receivership, substantially altering the newly extended workshop and, finally, letting it to another firm.

In this action A Co sought to recover from B Co the money it had expended on the extension.

Casey J held that A Co had no claim in mistake, implied contract or for moneys had and received. In His Honour's view the action could "only succeed on its pleadings on proprietary estoppel or constructive trust".

The elements of proprietary estoppel may be encapsulated thus:

(1) an expectation or belief of X as to the property of Y which
(2) Y knows about, coupled with
(3) an activity by X in reliance on his belief or expectation causing him to expend money on Y's property
(4) which activity Y encourages or dishonestly remains wilfully passive.

In this action the claim in proprietary estoppel failed. His Honour emphasised the identity of management of A Co and B Co and concluded that it would be "quite artificial" for one person involved in the company management to make representations to himself in another capacity: *Dillwyn v Llewelyn* (1862) 45 ER 1285 and *Ramsden v Dyson* (1866) LR HL 129.

Any other conclusion would have led the Court into difficult, impractical discussions in an attempt to ascertain the knowledge and intentions of one person in his different capacities. As Casey J commented:

> I . . . see a logical barrier to the concepts of "inducement", "encouragement", or "acquiescence" implicit in proprietary estoppel, in a situation where the beliefs and conduct of the two parties are formed and governed by the same minds. Estoppel is essentially concerned with the effect of representations by one individual upon the mind and judgment of another. I therefore conclude that this is not a case where that doctrine is appropriate.

The Court then turned to the claim for a constructive trust, which succeeded on the facts.

The Courts have imposed constructive trusts, over the past decade particularly, to prevent results which would, otherwise, be inequitable. Lord Denning has been largely responsible for the burgeoning of this line of authority (especially in matrimonial cases), founding constructive trusts "on large principles of equity . . . whenever justice and good conscience require it" (*Hussey v Palmer* [1972] 1 WLR 1286, 1289). This approach has led to some questionable results (for example, *Hussey v Palmer* itself and *Cooke v Head* [1972] 1 WLR 518) mainly because some Courts have failed to recognise that "justice and good conscience" permit the imposition of constructive trusts *only in defined circumstances* and *not* as a general

equitable remedy. The basis of some of these misunderstandings may be traced to Lord Diplock's oft-quoted remarks in *Gissing v Gissing* [1971] AC 886, at p 905:

> A resulting, implied or constructive trust — and it is unnecessary for present purposes to distinguish between these three classes of trust — is created by a transaction between the trustee and the cestui que trust in connection with the acquisition by the trustee of a legal estate in the land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired.

Out of context such remarks would seem to found a "large principle of equity" but Lord Diplock qualified them immediately by his next sentence:

> And he will be held so to have conducted himself if by his words or conduct he has induced the cestui que trust to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land.

Thus, before a constructive trust may be imposed two elements must be present:

(1) a common intention or agreement between the parties that the plaintiff shall have a proprietary interest in the property in respect of which the trust is claimed, and
(2) the defendant's conduct in refusing to acknowledge it must be fraudulent. Lord Diplock's final sentence (above) being an example of such fraud.

Casey J applied the principles of *Gissing v Gissing* without resort to their wider exposition in such cases as *Cooke v Head, Hussey v Palmer* and *Eves v Eves* [1975] 1 WLR 1338. In so doing he found, first, the requisite agreement as to the ownership of the extensions to A Co's workshop from the common intention of Hay and Atherton, reflected in the annual accounts of the two companies. Secondly, His Honour found that Downes realised how the management of A Co and B Co viewed the ownership of the extensions when he bought the B Co shares. At the date of purchase Downes acknowledged that he would be required to pay for the extensions "in the long run". This constituted an inducement such that Hay acted to his detriment as a shareholder in both companies by selling his shares in B Co believing that as a shareholder in A Co he would retain a beneficial interest in the land.

In the result, therefore, a constructive trust was imposed to compensate A Co for the amount paid out on the extensions.

The basic principles for the imposition of constructive trusts are applied clearly and accurately in this decision. Certainty in the law is thereby achieved instead of the unpredictability and criticism which refuge in vague "large principles of equity" inevitably attracts. Thus the final outcome of the case was just and in accordance with principle. An easier method of ensuring the same outcome for practitioners dealing with a similar situation would be to place a caveat on the title or to subdivide the land. The necessity for litigation would therefore be obviated and certainty assured.

J K Maxton
Lecturer in Law

Driving while disqualified — an illusory discretion and a technical defence

SECTION 35 Transport Act 1962 creates the offence of driving while disqualified in the following terms:

(1) Every person commits an offence who —
  (a) Drives a motor vehicle on any road while he is disqualified from holding or obtaining a driver's licence authorising that vehicle; or
  (b) Being the holder of a limited licence issued to him pursuant to an order made under section 38 of this Act . . . , drives on any road any motor vehicle otherwise than in accordance with the terms of the order authorising the issue of the limited licence.
(2) Every person who commits an offence against this section is liable —
  (a) For a first offence, to . . ., and the Court may order him to be disqualified from holding or obtaining a driver's licence for such period as the Court thinks fit:
  (b) For a second or subsequent offence, to the penalties specified in subsection (1) of section 30 of this Act.

The illusory discretion. As is well known, s 30(1) contains a mandatory direction that a person convicted of any of the offences mentioned in that subsection (including a second or subsequent offence of driving while disqualified) shall on conviction be disqualified from holding or obtaining a driver's licence for a minimum period of one year, unless the Court for special reasons relating to the offence thinks fit to order otherwise. However, s 35(2)(a) appears to give the Court a discretion whether or not to further disqualify a person upon his first conviction for driving while disqualified.

That appearance is misleading, for driving while disqualified is an offence to which s 31 applies; that section provides:

> Where a person, while disqualified from holding or obtaining a driver's licence, commits any offence which renders him liable to be disqualified from holding or obtaining a driver's licence, the Court, on convicting him for that offence, shall . . . order him to be disqualified from holding or obtaining a driver's licence for a period of 6 months . . . commencing on the date of the expiration of the first period of disqualification, unless the Court for special reasons relating to the offence thinks fit to order otherwise.

A number of interesting questions could be posed in respect of this section (does it, for instance, apply to offences to which s 44A Criminal Justice Act 1954 applies) but it is clear that it has the effect of removing the discretion as to disqualification which s 35(2)(a) apparently confers?

The technical defence. What is the position which arises if a person, upon his first conviction for driving whilst disqualified, is not disqualified for a further period of at least six months commencing on the expiration of the earlier disqualification and the Court has not made any finding as to special reasons relating to the offence?

There seems to be no reported decision on the matter but the point was considered by Judge Hall in the Auckland District Court in the case of *Auckland City Council v Puriri* (oral decision, 24 November 1981). In brief, His Honour held that the failure to comply with s 31 invalidated the

second disqualification and, if the second alleged offence of driving while disqualified took place on a date after the expiration of the first disqualification, that invalidity was a complete defence to the charge. In reaching that decision His Honour relied upon *R v Cameron* [1976] 2 NZLR 194.

Is the statute satisfactory? The writer, having been counsel for Puriri, naturally supports Judge Hall's decision as a correct statement of the law but, whether or not that decision is correct, he takes leave to doubt that the present form of the Transport Act 1962 is satisfactory.

The question, and it is a question of legislative policy, is whether Courts should have a discretion as to the further disqualification of drivers upon their first conviction for driving while disqualified. If Parliament intends that the discretion should exist, and by enacting s 35(2)(a) in its present form Parliament has seemed to indicate it should, then s 31 should be amended. If, however, Parliament intends that a further disqualification should be mandatory, and by enacting s 31 in its present form Parliament has seemed to indicate it should, then s 35(2)(a) should be amended.

Legislators are quick to criticise lawyers when the latter are perceived to be willing to raise technical defences to frustrate what is claimed to be the intention of Parliament in respect of road safety. Before doing so, in the writer's opinion, the legislators should look to their own work; in a field such as this where the law is wholly based on statute, technical defences become available only because the legislators have not made their intentions clear.

K I Bullock

Publican's right to refuse service

AT 7.30 pm on 14th March 1980, the respondent, a University law lecturer, and five members of the Auckland chapter of the Black Power gang entered the public bar of the Hamilton Hotel. The gang members were dressed in leather jackets, blue jeans and boots; they were not wearing "patches" and did not bear any of the outward signs that have come to be associated with motorcycle gangs. Ms Kelsey was wearing ordinary clothes. They all behaved courteously. One of the gang members was refused service by the barman and the bar manager, and Ms Kelsey was told she would also be refused service if she was "with" the members of the gang. The hotel manager had adopted the practice of refusing service to gang members and associates because of past troubles with gang brawls and damage to the hotel. He had erected a prominent notice to notify the public of that practice.

Ms Kelsey brought two prosecutions privately against the owners of the Hamilton Hotel, of refusing without reasonable cause to supply liquor to herself and to a gang member under s 188(4)(b) of the Sale of Liquor Act 1962. That provision allowed the licensee or the manager to refuse to serve liquor to a person if:

> . . . the person is, or has on previous occasions been violent, quarrelsome, insulting or disorderly, or . . . the licensee or manager or employee believes on reasonable grounds that the person will if supplied with liquor or (as the case may be) with more liquor than he has already had, engage in violent, quarrelsome, insulting or disorderly conduct provoke other persons to engage in such conduct on the premises.

Consolidated Hotels Ltd was convicted on both charges and appealed to the High Court (*Consolidated Hotels Ltd v Kelsey* Auckland, 26 Feb 1982. M1289/81).

The main argument of the respondent, Ms Kelsey was there was no "reasonable cause" under s 188(4)(b) to refuse to supply liquor. Barker J endorsed the view of the District Court Judge that the onus was on the appellant to show on the balance of probabilities that the employee concerned had "reasonable grounds" for a belief within s 188(4)(b). His Honour was of the view that the provision was aimed at individuals and that whole sections of the community — such as motor cycle gangs — could not be banned from hotels. Further, he decided that there were no "reasonable grounds" for excluding the individual respondent in this case.

Prior to 1979, publicans only had power under s 188(4) to refuse entry to those who, by reason of previous drunkenness or misbehaviour, have been warned not to enter the premises, or to someone whose presence on the premises would render the licensee or manager liable to a penalty under the Act (such as someone who appears to be under age). The general rule was that publicans were required to serve all citizens. During the last half of 1979, there were several outbreaks of severe gang violence at or near public bars of hotels. As a consequence, the government determined to grant publicans power to refuse to serve troublesome patrons. In the words of the Minister of Justice in introducing the Sale of Liquor Amendment Bill 1979 to accomplish that purpose, "the new provisions will enable the licensee or manager to take anticipatory action if he expects trouble from a particular person or group of persons". Those provisions became the amended s 188(4)(b) which Ms Kelsey tested.

In the case under study, the management of the Hamilton Hotel erected a notice which read:

ALL GANG MEMBERS AND ASSOCIATES PROHIBITED FROM THIS HOTEL. MANAGER.

in response to outbreaks of violence on previous occasions involving Black Power gang members in the hotel. Barker J in the High Court expressed concern for hotel managers in this position: "I have every sympathy with publicans and their staff who face often explosive situations with little opportunity for calm deliberation." However, he considered this matter to be outweighed by the rights of gang members, as members of the public, to be served liquor in public bars. Just because some gang members have acted violently in hotels in the past is insufficient justification, he stated, for the removal of that right from all gang members: "Such a blanket embargo presupposes that all members of motor cycle gangs are ipso facto vandalistic and anti-social — a proposition which cannot be correct." It is worth noting that Barker J's conclusion is in accordance with sentiments expressed by members of the select committee which dealt with the 1979 amendment.

As to what constitutes "reasonable grounds", His Honour concluded that the test is an objective one which is only satisfied by "some examinable and real ground" for exclusion. Further, a judgment had to be made in each case by looking at the behaviour of the particular people in question and then deciding whether they would, if supplied with liquor, engage in or provoke violent, quarrelsome, insulting or disorderly conduct.

There seem to be two main ways in which a publican can make that type of judgment (noting that actual violent etc conduct and previous such conduct are

covered by the first part of s 188(4)(b) which does not require a "reasonable grounds" test).

First, a person may be guilty by association as part of the offending group, and secondly a person may be menacing or threatening without being openly disorderly, causing the publican to fear for the safety of his patrons. This would give the publican wide powers to refuse service.

Two further notes: (1) An individual unknown to the publican (all other factors being equal) would probably have a better chance of being served than one who is known. (2) It is suggested that "quarrelsome" may cover conduct which is seen as being argumentative so as to incite disturbances. Publicans may be placed in fear of harm to patrons or damage to the bar. Reasonable grounds for suspecting that this type of conduct may eventuate will be easily formed. It was clear, as Barker J stated, that the "peaceful and unthreatening" conduct of Ms Kelsey and her companion gave no such grounds "[B]oth acted with courtesy throughout the exchanges with [the bar manager] and the barman. Neither wore provocative insignia; they had merely volunteered the fact of membership in or association with the Black Power gang in Auckland". Nor should the wearing of insignia be seen on its own as sufficiently menacing to fulfil the provisions (see comments by R Prebble MP during the first reading of the 1979 Bill).

In 1974, the Report of the Royal Commission of Inquiry *The Sale of Liquor in New Zealand* stated "We are mindful of the need to preserve the traditional right of the citizen to be served with liquor in a public bar. This right, however, must be weighed with the equally important right of each citizen to drink in a public bar without fear of physical injury or molestation, and with the right of the bar staff to work in safety with reasonable protection against personal injury. In the prevailing climate of unpredictable violence and disorderly or irresponsible behaviour we believe that the safety and protection of ordinary people must be the predominant consideration." Section 188(4)(b) represents a move away from a traditional view of the publican's obligation to serve all people towards a view which facilitates the protection of ordinary members of the public at the expense, if necessary, of troublesome groups and individuals. In debate during the second reading of the Bill which resulted in the present s 188(4)(b), one Member expressed the wish that the provision would not be used too liberally by publicans. The *Kelsey* case ensures that its exercise is kept within respectable boundaries.

W G F Napier

Forebearance to sue — insolvency

IT is an established principle of the law of contract that forebearance to sue amounts to valuable consideration. The decision of Hardie Boys J in *Re Austin* (High Court, Christchurch. 1 June 1972 (B166/78)) however should serve as a warning to those who believe the principle is of general application.

Austin was a self-employed painter who fell behind in his trade account with his supplier. Bankruptcy proceedings were instituted, but at the eleventh hour a mortgage was arranged and the petition struck out. Shortly afterwards, however, a different creditor initiated bankruptcy proceedings and Austin was adjudicated bankrupt. The Official Assignee purported to set aside the mortgage as having fallen within the twelve month time period for the voidable preferences under s 57(1) of the Insolvency Act 1967. The creditor argued, inter alia, that the mortgage fell within the first exception under s 57(2), which provided for "money actually advanced or paid, or the actual price or value of property sold or supplied, or any other valuable consideration given in good faith. . . ."

It was argued that the consideration was the forebearance to proceed with the bankruptcy petition. The Official Assignee, on the other hand, acknowledged that there had been that forebearance but submitted that it did not constitute "valuable consideration".

His Honour dealt with the question on a step-by-step basis. First he cited Sir Frederick Pollock's definition of consideration, adopted by Lord Dunedin in *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847, 855:

> An act of forebearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable.

His Honour, however, noted that value is not to be confused with adequacy or even money's worth. Rather (applying Lord Wilberforce in *Midland Bank Trust Co Ltd v Green* [1981] 1 All ER 153, 159) it is an expression denoting an advantage conferred or detriment suffered.

His Honour then observed that it has been clearly established in bankruptcy cases in England that a forebearance to sue or similar consideration amounts to valuable consideration for the purpose of obtaining protection from the relation back and avoidance provisions of that country's Bankruptcy Act 1914.

His Honour then considered the Official Assignee's argument that a different view should be taken of the New Zealand Act of 1967 because of its new approach to the avoidance of antecedent transactions. In the only reported New Zealand judgment on this section, *Re Holm* [1974] 2 NZLR 455, the point went by default. There, counsel for the Official Assignee conceded that forebearance to sue was valuable consideration for the purpose of s 57(2). In this case that same counsel now repented that concession, arguing that valuable consideration must be something truly valuable. Reference was made to Sutton's *Creditors' Remedies in New Zealand* (1978) pp 123-124. Sutton's argument was that the different wording (read this part slowly) in the section required not that the security be taken in good faith and for valuable consideration, but that valuable consideration be given in good faith. The true test in applying s 57(2) should be the estimation of "the true value of the consideration passing in good faith from the creditor to the debtor".

His Honour accepted this argument, holding:

> This is not, I think, to give the expression "valuable consideration" a meaning different from that which it normally has. Its use in this context may perhaps be confusing, but perhaps may have been thought unavoidable.
>
> In any event, the point is not whether the consideration for the security was valuable in the sense that it was a sufficient consideration for the contract entered into, but whether that valuable consideration amounted in fact to something of value, such that the security can be said to relate to it, and to be protected to

> the extent of that value. . . . I think it is clear that the subsection contemplates a co-relation between the extent to which the security will be preserved, and the value given in exchange for the security. Such a co-relation cannot be achieved except in terms of money or money's worth. The Court therefore has to put a value upon the valuable consideration, just as it must do in the case of property supplied where there is no actual price. Were it otherwise, the wording of the subsection would I think have been quite different, for example, "any security or charge given in exchange for" or "given in respect of".

In the case at hand, Austin was clearly in financial difficulties. There were large unsecured debts with little or no free assets to meet them. Judgment had been entered against him on eight occasions and a bankruptcy petition had been issued against him in respect of another judgment. His first cheque to the creditor had been twice dishonoured and he had failed to call to sign the first mortgage and to pay the moneys he had agreed to pay at the time. The creditor's willingness not to bankrupt him was merely a postponement of the inevitable. Any value in the agreement to give the security was to the creditor. Accordingly, the security was not protected by s 57(2)(a).

Committal proceedings

THE judgment of McMullin J in *R v Royce* (Court of Appeal, 1 July 1982, (CA203/81)) provides guidance for committal procedures pursuant to s 39J of the Criminal Justice Act 1954.

Royce was remanded in custody on charges of theft and the unlawful undertaking of three motor vehicles. Three days later he escaped from the police cells by squeezing through the bars. He remained at large for six weeks, during which time (according to his admissions to the police) he had committed some 94 property offences to the value of $233,000. His explanation was that his Social Welfare benefit had stopped and he needed money. He was eventually referred to a psychiatric hospital and lost little time in effecting a second escape, this time through a narrow gap in a metal window. He was apprehended after a four-day escapade involving the conversion of two cars, one of which he wrote off. He was eventually sentenced in the High Court on some 70 charges that resulted in an effective term of six years imprisonment.

In applying for leave to appeal against sentence, it was argued that the Judge had not taken Royce's mental condition into account, and that he ought to have been committed to a psychiatric hospital for proper treatment and care.

At the time of sentence the Judge had before him a probation report setting out Royce's history and a report from the Medical Superintendent of a psychiatric hospital. The report recommended treatment but added that Royce's propensity for escaping would create a nuisance for the community unless he was either treated or imprisoned. The Judge expressly took note of the need for the community to be protected from Royce and of a suggestion in the Superintendent's report that treatment could be arranged by transfer from a penal institution to a psychiatric institution if need be.

It was argued, however, that imprisonment was not the appropriate sentence at all in the circumstances and that the Judge should have made an order for committal to a hospital. According to counsel, Royce had laboured for many years under hallucinations and that under proper treatment his offending could be stopped.

The Court of Appeal, however, noted that the applicant had not satisfied the requirements under s 39J. Firstly there was no certificate from two medical practitioners. Further, the section required that the practitioners concerned need to consider more than the public interest in treatment and rehabilitation. Applying *R v Elliott* [1981] 1 NZLR 295, it was noted that it was not sufficient for a practitioner to consider it *desirable* that an offender should be committed to a mental hospital; he must consider his detention to be *necessary*.

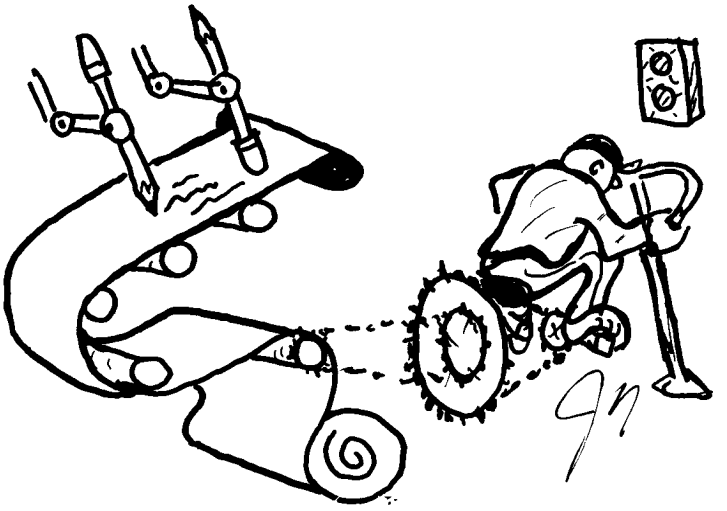
In this case the threshold requirements had not been met. Even, however, had a certificate been forthcoming, the Judge would not have been obliged to act on it as he was concerned with the public interest as well as the interests of the applicant himself. Here it was proper for the Judge to retain control over the length of sentence rather than delegating the matter to hospital authorities. The application for leave to appeal was accordingly declined.

Worth quoting

"THE citation of a plethora of illustrative authorities, apart from being time and cost-consuming, presents the danger of so blinding the Court with case law that it has difficulty in seeing the wood of legal principle for the trees of paraphrase". *Lambert v Lewis* [1981] 1 All ER 1185, 1189 per Lord Diplock.

John McManamy

Law reform



The Courts and technology

IN a recent press release, Kirby J, Chairman of the Australian Law Reform Commission, advocates the use of technology to expedite Court proceedings. Among his suggestions:

Use of video-tapes of witnesses' evidence. This would save costs of witnesses waiting around Court and interruptions in the trial waiting for witnesses to arrive. In the US in 1982 a murder trial was conducted entirely on video-taped testimony, taped to suit the convenience of witnesses and lawyers. The final tape was edited by the Judge to remove inadmissible evidence, following arguments by counsel. In civil cases since its introduction on a limited basis in 1975 the number of cases awaiting trial has dropped by 36 percent.

Use of sound and video recordings of statements to the police. This would reduce Courtroom disputes concerning police confessions.

Use of telephones. One hundred years after Alexander Graham Bell's invention, the telephone is beginning to be used in proceedings in Australia. Three- and four-way links are established between the Administrative Appeal Tribunal, litigant, Department officer, and witnesses.

Summing up, Kirby J noted:

> An occasional change of Court rules and a few crocodile tears about delay will be no substitute for a thorough attack on the causes of delay. There needs to be a greater willingness to change old ways of doing things, especially by the adoption of new technology as an aid to reform. If it means more people will get to the independent umpire, we should be willing to adopt procedures which might be regarded as less than perfect to today's lawyers. It may be better that thousands get to generally fair justice than that only tens get to exquisite justice — because only they can afford the costs and delays involved.

Penal policy

YOU'VE lost your case and are trying to decide what mind to plead in mitigation. Answer — ask for a "regional prison — a new concept in penal reform".

According to the Department of Justice, Wellington, Invercargill and Dunedin could be test areas for regional prisons. This move would implement a recommendation of the Penal Policy Review Committee (see April *NZLJ*) which took the view that inmates should be imprisoned as close to their home communities as possible. Many factors were considered in choosing these three areas, the main one being community support and involvement. According to the Justice Department, these locales will experiment with the concept of "throughcare" (noted in April and August *NZLJ*). In the meantime, the Minister of Justice envisages the introduction of a new Criminal Justice Bill and a Penal Institutions Amendment Bill in May next year.

Appeals on Questions of Law from Administrative Tribunals

THE sixteenth report of the Public and Administrative Law Reform Committee, released in July, recommends that the practice of conferring on those aggrieved by the decision of an administrative tribunal a right of appeal to the High Court on a question of law should be extended. The Report notes that while an appeal right will delay the final disposition of the issues and involve the parties in more expense, an appellate body can be expected to refine the issues, clarify the facts, and apply greater skill and experience to questions of law. The Report rejected the "floodgates" argument, noting that the High Court's power of awarding costs can have a deterrent effect on those contemplating an unmeritorious appeal. The Report further noted that various practical considerations such as departmental policy and staff relations should not exclude the general right of appeal.

When proposing a new procedure for appeals, the Committee recommends:

- An appeal would be commenced by the appellant filing in the High Court within one month (two months in relation to tax, see para 13) of the date of the determination appealed from a notice of appeal restricted to questions of law. The appellant would be required to serve a copy of the notice on every other party to the proceedings as well as the secretary, registrar or other similar officer of the tribunal.

- The notice of appeal would be required to specify —

  (i) whether the whole or part only of the determination is appealed from and, if part

only, to specify that part;

(ii) the errors of law alleged by the appellant together with a clear statement of the questions of law to be resolved; and

(iii) the grounds of the appeal specified with such reasonable particularity as to give adequate advice both to the Court and the other parties of the issues involved.

- As soon as the secretary, registrar or other similar officer of the tribunal has received a copy of the notice of appeal he would be required to send a copy of the whole of the determination appealed from to the High Court.
- Any party desiring to appear and be heard at the hearing of the appeal would be required, within 10 days after the receipt of the notice of appeal, to give notice of that intention.
- Any party would have the right to apply to the Court within one month of the date of filing the notice of appeal in the case of the appellant or within one month of the date of service of the notice in the case of any other party for any of the following orders —

(i) An order directing the tribunal to lodge with the High Court any document or other written material or exhibit in the possession or custody of the tribunal;

(ii) An order directing the tribunal to lodge with the High Court a report recording, in respect of any matter or issue which the Court may specify, any of the findings of fact which are not set out in its determination;

(iii) An order directing the tribunal to lodge with the High Court a report setting out, in respect of any matter or issue which the Court may specify, any reasons or the considerations to which it had regard which are not set out in its determination.

Before making an order the Court would require to be satisfied that such an order was necessary to allow proper determination of the point of law in issue.

- Any party other than the appellant who wishes to contend at the hearing of the appeal that the determination appealed from is erroneous on a point of law not included in the notice of appeal would be required to file a notice to that effect within one month after the date of service on him of the notice of appeal. The provisions relating to the notice of appeal would, with the necessary modifications, apply to such a notice.
- When the appellant or any other party has notified the registrar of the High Court in Wellington that the appeal is ready for hearing the registrar would be required to arrange a date for the hearing of the appeal as early as possible.

Among procedures affected would be the case stated procedure under s 162 of the Town and Country Planning Act 1977.

Credit contracts — sequel

IN the July issue of the *Law Journal*, we published statements by the Minister of Justice, who criticised the profession for its failure to make recommendations while the Bill was in its early discussion stages. A letter to *Council Brief* by Wellington practitioner Gordon Black sheds further light on the controversy. Black wrote to the Minister on 20 October 1980 pointing out his objections to the Bill and in due course received the following reply:

> The points made . . . have been put before the Committee by a number of groups making submissions and will of course be borne in mind at the appropriate time. . . .

Gordon ends his letter to *Council Brief* on this note:

> You will notice . . . that he acknowledges that others have raised the same points. October 1980! Some 20 months before the Act came into force — warts and all!

Regulation of lawyers — NSW style

THE debate over the Law Practitioners Bill and the establishment of a working party on *Access to the Law* (see August NZLJ) provides a contrast between the New Zealand and overseas way of doing things.

Cut to New South Wales. In 1976 the NSW Law Reform Commission received a reference from the State Attorney-General "to inquire into and review law and practice relating to the legal profession and to consider whether any and, if so, what changes are desirable. . . ." The Commission published a series of papers in which it comprehensively criticised the organisation of the profession and proposed a range of reforms. These became the basis of intense debate (those who attended Julian Disney's session at the Law Conference last year were treated to a sampling of this, evidenced by the presence of Australian hecklers near the front of the audience) which then formed the basis of modified recommendations in some of its final reports, recently tabled.

In its earlier discussion papers, the Commission was concerned that a regulating body should be independent of the profession in that "there is a conflict between the regulatory and trade union roles, and that the result of expecting one body to perform the two roles is likely to affect adversely and unfairly the public interest or the professional interest or both".

In the Commission's final report, however, ultimate power would still lie in the hands of the profession, although with significant (rather than token) lay involvement.

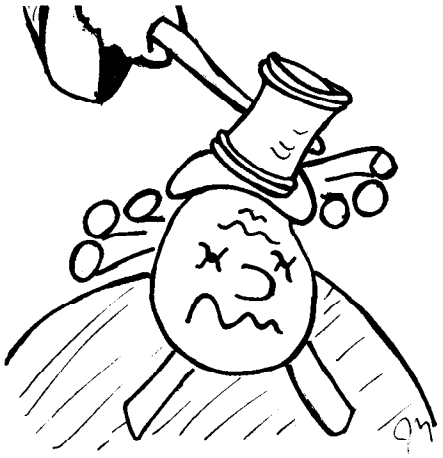
CER

"THE implications for New Zealand of the CER agreement will be thoroughly scrutinised by Parliament, just as they are at present being thoroughly scrutinised by the Foreign Affairs Committee, and just as they have been thoroughly scrutinised by those in the private sector who are directly affected by the new arrangement. What is more, that scrutiny and debate will take place first with full knowledge of the final agreement — in fact it would be inappropriate for it to take place beforehand — and, secondly, after the fullest possible information has been made available by the Government to Parliament and to the Public".

The Hon J K McLay, Minister of Justice.

John McManamy

Inter Alia



Ray Denning — folk hero

RAYMOND Denning's story invites comparison with Ned Kelly, Australia's 19th century folk hero outlaw:

Denning is a prisoner of long-standing. He was serving a life-sentence for assaulting a prison officer during an escape attempt from an Australian prison in 1974. Denning has always asserted his innocence on this charge. In April 1980, he escaped from a special unit in Grafton Prison and eluded a massive police manhunt. Denning lay low in the bush for two weeks, then slipped through a police dragnet, arriving in Sydney in less than robust condition some three stones lighter. The police were describing Denning as "armed and dangerous".

In the meantime, supporters rallied to Denning's cause. Incidents of bashings he had received at the hands of prison officers were reported. On 11 April, a Sydney barrister, John Basten, made a public announcement that Denning had conveyed several demands through an intermediary: he would give himself up in the presence of a lawyer if he received assurances that he would not be returned to Grafton, not be charged with escape, and be allowed to serve his sentence without further harassment. (The NSW Bar Council initiated proceedings to disbar Basten but withdrew the action in October.)

On 20 April, a tape was delivered to a Sydney radio station. Denning made new demands related to prison conditions and treatment by prison officers (a verification of a Royal Commission report, although the prison officers involved were never charged) and the alleged fabrication of his false charge. This became the first in a series of Denning tapes, which culminated in a video shown on a current affairs programme. Public and press reaction became sympathetic. Australian *Playboy* ran an interview. Police in the meantime alleged Denning to have been involved in a shooting incident. In November, a special squad was formed. People connected with the Prisoners Action Group, which publicly supported Denning, were raided or arrested. Denning then withdrew from his public campaign, possibly out of fear that his actions would jeopardise his supporters. Late last year Denning was recaptured at gunpoint in the Sydney suburb of Manly. He is now back in prison, charged with possession of an unlicensed pistol, two armed robberies, and failure to name the person involved in the shooting incident. Shortly after his re-arrest, the police gave the press access to an arsenal of weapons they claim to have found in a flat near Sydney. They postponed charging Denning with possession of these weapons until the media could publish photographs (thus not breaching any contempt of Court laws). In the meantime Denning is applying to the NSW Attorney-General for an inquiry into his 1975 conviction (which he claims is based on a fabricated record of interview).

(Denning's extraordinary saga is related in (1982) 7 *Legal Service Bulletin* 109).

The lawyer and technology

LAST year Parliament enacted 139 Acts and 378 sets of Regulations. Over 800 judicial decisions were sent to the Editor of the *New Zealand Law Reports*. The unaccounted for number of other High Court, Court of Appeal, District Court and Tribunal decisions can only be described as prodigious. Against the legal flood-tide, today's lawyer is hoping to be bailed out by the Mighty Micro. A computerised system of information, storage and retrieval, in widespread use overseas, is being looked into and debated by lawyers and those in the computer and publishing industries. The ideal would be to have new law fed into a data bank for instant viewing at home or office. The practical problems, however, are too numerous to mention and there is a theory for every computer sales-person in the country. The main problem in New Zealand is its small subscriber base. In theory, the technology is there but it will take considerable thought before a system can be developed suited to New Zealand's needs.

●

THE Post Office later this year will be introducing pocket-sized "bleepers" (the type seen in use by TV doctors) for sale and rental. Once the go-ahead is given by the Post Office, the lawyer's office will be able to "bleep" its more mobile practitioners to call the office for important messages. In various jurisdictions in the United States, the Court staff routinely bleep counsel as their fixture comes up. This application is a possibility in New Zealand and the day may be at hand when wasted time waiting in Court becomes a thing of the past. Presumably, the task of convincing the powers that be will fall onto the Law Society. Those interested in the system should contact the Post Office or one of the local offices of Answer Services Ltd.

●

A lawyer in Invercargill calls an office in Auckland urgently requesting certain legal documents. He has the copies in his hands in five minutes. The system is called facsimile transmission (fax). A document is inserted into a machine at one location and out comes the copy from a machine somewhere else. The

system is being introduced into the UK, and the implications are considerable, particularly for New Zealand firms involved in international transactions. Transmission takes anywhere from 20 seconds to six minutes, depending upon type of machine and quality of document.

Disbarment — Czechoslovakia style

DR J Cernogursky defended a client charged with the possession of illegal literature. During the trial and on appeal Cernogursky defended the innocence of his client vigorously, arguing inter alia that the literature in question was not anti-socialist and that intent to distribute it was not shown. He protested further against the violation of the right to public trial and emphasised the need to respect the Helsinki agreements. Shortly after the case (his client was convicted of course) the Bar Association released the following statement: ". . . because . . . he acted in variance with the legal rules, the Socialist legal consciousness, the interests of the Socialist Society and economic principles of providing legal assistance, and due to the fact that he seriously neglected his duties . . . with regard to legal practice, he was expelled from the Association . . . and his membership ceased on April 15, 1981".

Moral — stick to conveyancing.

On being a lawyer in Argentina

SINCE the 1976 military coup, more than 90 lawyers have "disappeared" and at least 99 have been imprisoned. The International Commission of Jurists has published a sampling of accounted-for detained lawyers:

N H Forlesti, a 34-year old lawyer and advisor to a trade union, has been detained since May 1975. A series of trials, retrials and appeals concluded in April 1981 with convictions for "illicit association" and "attempting to alter or overturn the institutional order . . . by unconstitutional means". The six year sentence expired in May 1981. Since then Forlesti has remained in prison "at the disposal of the executive".

E Y Jozami is a 44-year old former professor of law, defender of trade unionists and political prisoners, member of the Argentina Lawyers Guild, and journalist. Imprisoned since June 1975, he was tried in 1977 and sentenced to eight years' imprisonment for "illegal association". His health has deteriorated appreciably during imprisonment. He is semi-paralysed and may be suffering from cancer of the spine.

R Ripobas, lawyer and former local Bar Association officer, was active in the defence of political prisoners and in certain widely publicised cases involving allegations of torture. Arrested in September 1974, he was convicted of the crime of "illicit association" only in April 1979. Charges of possession of explosives and auto theft were dismissed for lack of evidence. He was sentenced to six years' imprisonment, which expired in September 1980. He was not released at the expiration of his sentence, however, but was detained "at the disposal of the executive". During imprisonment he suffered serious injuries, including broken bones.

As a result of strong pressure from groups such as the Bar Association of the City of New York, the number of lawyers in detention in Argentina has declined. Nevertheless the Argentine situation is not a mere aberration. The trend is world-wide and needs to be countered by pressure from New Zealand lawyers (who knows, we could be next).

Human Rights — The case of Captain Astiz

ONE issue arising from the Falklands conflict concerned the British repossession of the island of South Georgia on 25 April and the capture of the Commander of the Argentine garrison, Captain Astiz. Astiz is alleged to have taken part in past kidnapping, torture, and execution of political opponents of the military regime. His activities were brought to the attention of French and Swedish authorities when he was connected with the disappearance of three of their citizens. By virtue of his capture Astiz was a prisoner-of-war and entitled to the protection of the Geneva Conventions of 1949. He was transferred to a military prison in the United Kingdom and was questioned but gave no information other than name, rank, and number. The British would have been entitled to detain him until the end of hostilities, but in fact repatriated him to Argentina like its other POWs.

A suggestion has been made that Astiz could have been prosecuted for the crime of torture under international law. Whether British Courts would have gone along with the idea, however, is a matter of speculation. Additionally, the British could not have put him on trial as a war criminal, for the offences alleged against him were not committed in the course of hostilities with Britain. Finally, neither France nor Sweden could ask for extradition as the offences committed against their subjects occurred in territory outside their jurisdiction.

Astiz is now back in Argentina, presumably earning his living as a loyal servant of the regime.

(Source: [1982] *The Review* published by the International Commission of Jurists.)

From the Milligan Book of Records

- The world's longest mile is two and a quarter miles long.
- Alfred Scraunch has held an unbroken rib-cage for 60 years.
- The world's largest rupture weighs 18 lb 3-1/4 oz and is about to go metric. It is now in keeping with the National Truss.
- Still to be verified: Captain Hugh Cobalt in a submarine holds the record for singing "Shadow of Your Smile" in Eb in the *Nautilus* 200 ft below the Polar Ice Cap — mean average temp -4°; inside leg 32 ins.

(Published by M B J Hobbs, 1975)

Worth quoting

"STEADILY the best skill and capacity of the profession has been drawn into the exacting and highly specialised service of business and finance. At its best the changed system has brought to the command of the business world loyalty and a superb proficiency and technical skill. At its worst it has made the learned profession of an earlier day the obsequious servant of business, and tainted it with the morals and manners of the market place in its most anti-social manifestations."

Justice Harlan Stone (US Supreme Court Judge, 1934).

John McManamy

The modern law office

Alan Dormer

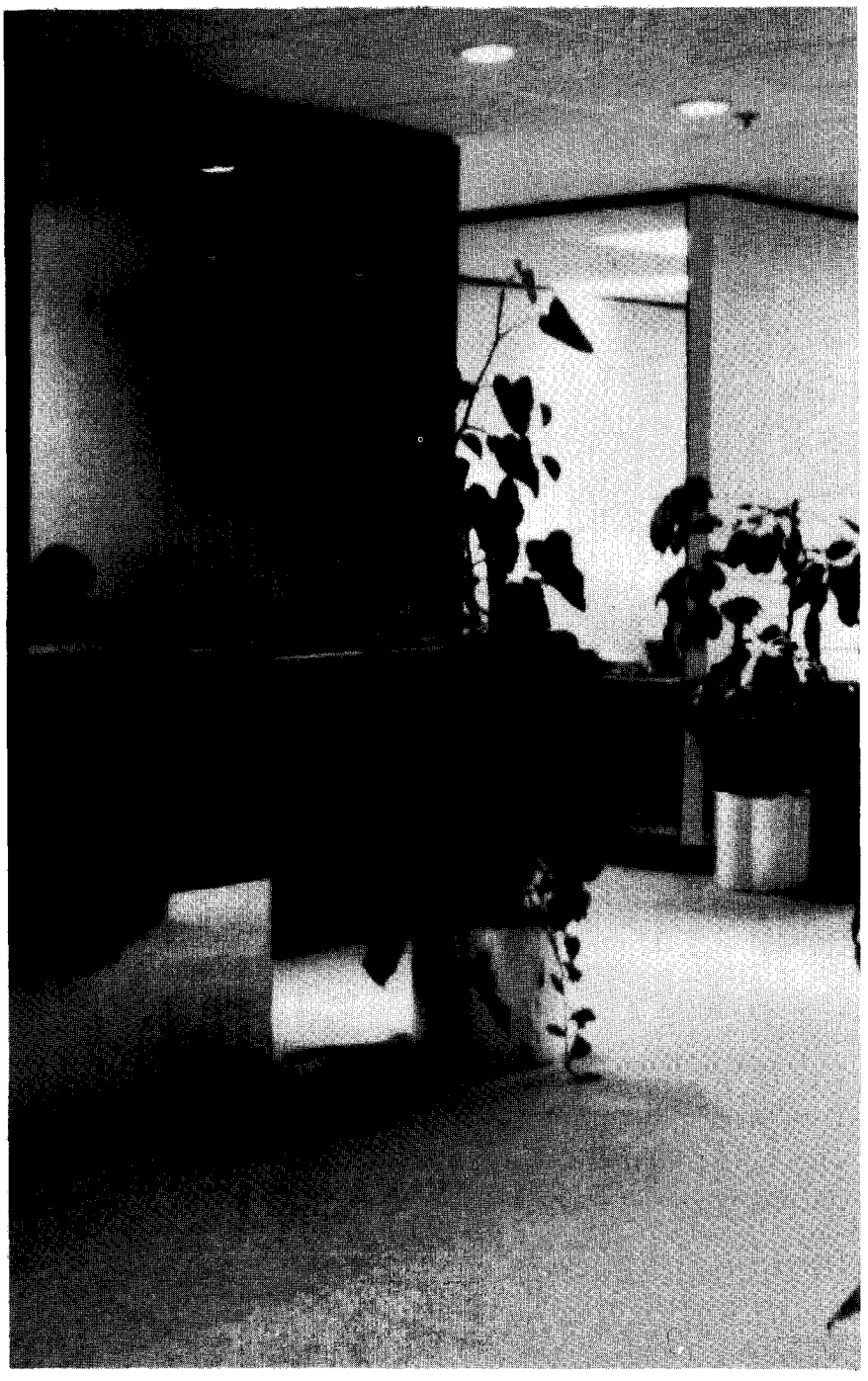
This is the first article in a series on New Zealand law offices. In future issues, we hope to present a wide sampling of different firms in which lawyers discuss the practical aspects of operating a practice. Two months ago, the editor called in on the Auckland firm of Nicholson Gribbin & Co, which had recently moved to new quarters. The end result of the move was the product of careful planning and imagination. In terms of budgeting, the partners clearly opted on the side of a pleasant working environment. Nevertheless, there is a premium on office efficiency. I asked the author, a partner in the firm, to jot down some rough notes. Following is his reply:

DEAR John,

Many thanks indeed for your letter of 19 July. I hope that the following "rough note" does succeed in reconstructing our conversations:

Personnel

We have:
Twelve partners, 10 staff solicitors, 5 law clerks (ie finishing professionals at law school), 3 legal executives, 10 secretaries, 1 receptionist/secretary, 3 full-time and 1 part-time staff in accounts, 1 office manager, 2 stamping/registration/filing clerks, 1 telephonist, 2 office juniors, 1 housekeeper (tea-lady — partners' lunches), 1 clerical supervisor. The word-processing staff is a little more difficult to define in these terms: the position is that we have one word-processing operator working normal hours (she is also the word-processing supervisor), one who works normal hours four days a week, and four others, each of whom work 30 hours per week of shift work, either on the 7.00 am - 1.00 pm shift or the 1.00 pm - 7.00 pm shift.



Foreground — reception area. Background — offices, note glass panelling.

Office Plan

Floor space

The floor space consists of 11,956 square feet on the 14th floor, with a further 2,400 square feet on the 13th. The 14th floor accommodates reception, all legal staff and stamping, searching, registration. The 13th is taken up with accounts, word-processing and staff lounge. We have also sub-leased out to a firm of patent attorneys a further 2,100 square feet on the 13th floor.

Partitions

All the offices except those in the four corners are glass-fronted. This decision was made to:

- Maximise the passage of natural light to "the interior", as few like to work in interior offices.
- Obtain the optimum benefits of the view. Not only can those working in the interior gain something of a view through the external offices, but the view is also an ever present factor when walking along the corridors.

One other beneficial by-product of the glass-fronted windows is the heightened importance of maintaining a tidy office, as no longer is it hidden from the gaze of "passers by".

A cost-saving has also arisen, not by virtue of the glass itself which is just as expensive as partitions, but by the consequent lowering of the height of internal partitions so as to maximise the view opportunities, the flow of natural light, and to maintain the sense of openness caused by the glass-fronted offices. All internal partitions are only about 3 feet 9 high. Another advantage of the low partitions is that they are easily portable, and whilst we have not yet found it necessary so to do, the potential is there for us to re-arrange the internal spaces should the need arise. Had we not had the glass fronts on the external offices, we could easily fall into the "trap" of having floor to ceiling partitions on the internal offices, which would have made it much more difficult to re-arrange these when the need arose.

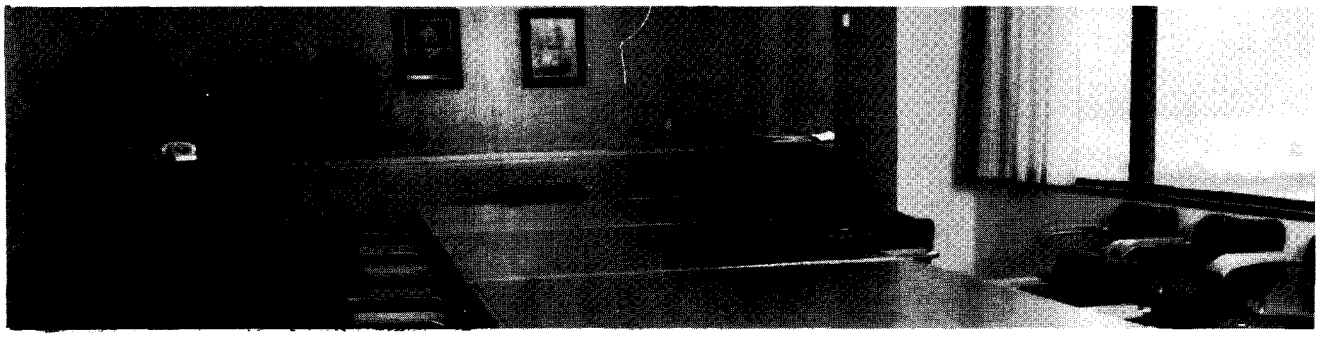
A further unexpected benefit has been that no longer are we interrupted whilst with clients, because anybody looking into the office can see whether or not the lawyer has a client with him.

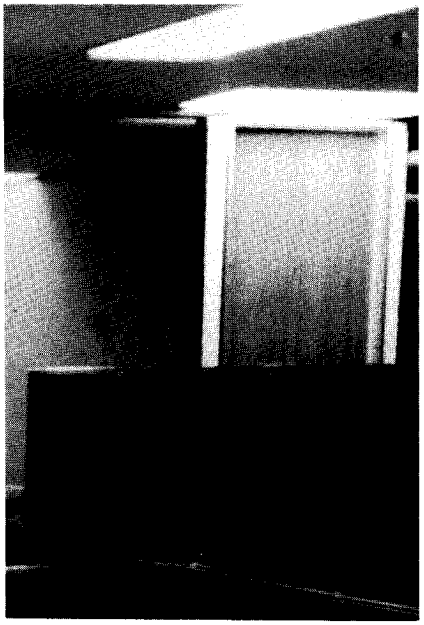
The disadvantages of the "open office" when the idea was first mooted were perceived to be a lack of personal privacy, a lack of privacy for the client, and a distraction caused by people walking past. In the event, none of these criticisms have been made of the system once in place. Nor has there been any unfavourable client feed-back.

The overall design has, we are sure, successfully produced a better work environment for secretarial and support staff; and therefore hopefully contributed towards staff morale.

Offices

The policy is that all filing cabinets are kept out of offices. The offices vary in size inter se, although on average are about the norm for modern buildings. They do appear larger however, and this is largely due to the absence of filing cabinets. The decision to keep filing cabinets out of offices came about in part because of the frequency with



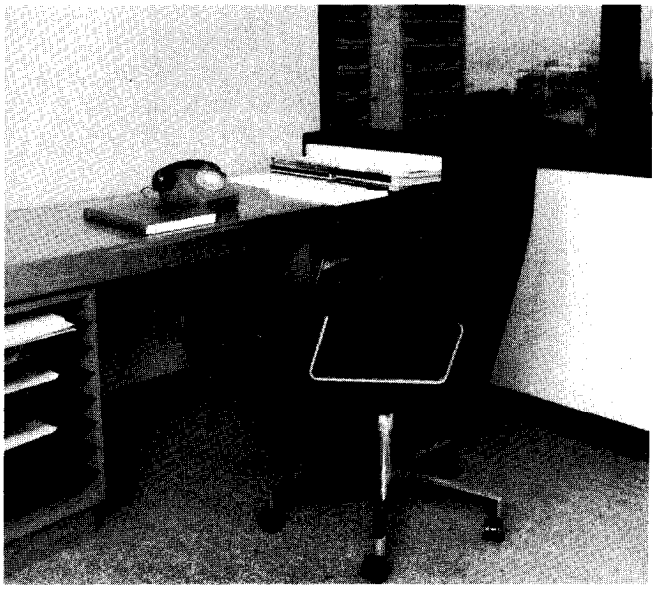


which two or more lawyers or secretaries are working on the same file. It is desirable that people are able to access the file at all times (which is not generally possible if the files are in a lawyer's office and he has clients with him). The removal of files from an office also adds measurably to the ease with which an office can be kept tidy.

Another feature of most of the offices is that the lawyer's desk is facing the wall or a window, and that the client interview does not take place across any "barrier". We see no need to "protect ourselves" from our clients, and most of the offices have a separate "conference table" around which discussions take place. We certainly find that this puts the client more at ease, and it also has the benefit, especially for those of us who are not naturally "clean desk men", that our client interviews are not distracted by papers or documents relating to other client's affairs. Certainly it is easier to leave the client with the impression that he has the lawyer's full attention.

All the lawyers have external offices, as indeed do some of the law clerks. However, as the latter are primarily engaged in research, drafting, and other tasks which do not involve significant face to face client contact, they do not have the same need for the privacy of an office as do the legal staff. Accordingly, as the number of legal staff grows, the position will be that all law clerks will be seated in internal offices, and will conduct such personal client contact as is required either in two interview rooms specifically set aside for that purpose, or alternatively in the office of the lawyer under whose supervision they are working should that be free.

The interview rooms have also proved convenient places to park occasional other visitors to the office, eg audit staff or clients or other lawyers who wish to make a telephone call in private.



— *File cabinets outside*

— *Clean office inside.*

Plant

Our plant consists of:

- A Wang OIS System with a 53.6 Mb disc and four Visual Display Units and two Daisy Wheel Printers with twin sheet feeders. The advantages of this system from our point of view is that more than one operator at the same time can key into a single precedent stored in a central memory.
- A Qantel Computer with a 96K 40 Mb fixed disc, a 300 line per minute printer and three VDUs. The software is a Quils Legal Program for trust and mortgages together with general account, time recording and account-rendered facilities. The choice in opting for two separate systems was based on the state of the play of two years ago. Then, a peak demand at the end of the month for processing accounts would have decreased our word-processing capability. Apparently, there are now integrated systems capable of coping with the difficulty. Our choice of brand name reflects our own needs and preferences.
- We have a micro-film camera, jacket-filler, one viewer and one viewer/printer. With the recent change in the rules concerning trust accounts, we can now microfilm these records and destroy hard copy after four years.

Above: The firm's micro-filmed files are stored in the cabinet beneath the screen.

File storage

Previously, Nicholson Gribbin & Co was in the Power Board Building, where we had an arrangement which allowed us to use a large basement area for the storage of old files. A similar arrangement was not possible in the new building, and indeed given the rents would have been prohibitively expensive in any event.

We therefore had to deal with the problem of storing concluded files. We initially gave some thought to a Lundia system or something similar, but soon discarded this when we discovered that to store even 2 years' files would take the space of two or three offices, which space we could neither spare nor afford to be used in an unproductive manner. The solution we arrived at was to microfilm every file as it is finished, and then to remove the file to the Power Board Building basement. We also microfilmed all files completed during the previous two years. (We surveyed our requests for old files and found that over 90 percent were for files not older than two years.)

The cabinet storing these records (of 42,000 files) is situated in a small alcove on the 14th floor, alongside of which there is a viewer/printer; and we are therefore able to gain instant access to completed files without having the cost of storing them in high rent space. (We do not however microfilm those very large, usually common law, files as the time involved in scanning the film to find a particular letter or document is so great that it is probably just as quick to send a junior up to the Power Board Building to find the file itself. The clerical supervisor is responsible for microfilm storage of completed files, and either she or her junior takes new files up to the Power Board basement daily, and there is therefore very little delay in obtaining a file from storage should it be necessary.)

Typing

The rule is that "authors" are not to give their secretaries shorthand, although this is occasionally honoured in the breach. Nevertheless, the theory is that all letters and all non-form documents are typed on the Word-Processor. The author dictates his material, places the tape inside a "jacket" on the outside of a yellow cardboard folder and places the folder in one of a number of strategically located collection points.

An office junior is on virtually permanent circulation around the office taking material from the collection points down to Word-Processing on the floor below. Completed work is placed inside the author's folder, and on her return journey the junior distributes the completed work to the various authors, depositing same in their "in-tray". The author peruses the material, if in order signs it, and places same in a green folder. If corrections are required, these are made by the author in red pen, and placed in a blue folder. The green and blue folders are then taken by him to the collection point. The junior takes the blue folders back down to Word-Processing where they are accorded priority over new work. She also takes the green folders and photocopies all items therein, returning the green file with the appropriate copies to the author's secretary.

All work received by the Word-Processing Department is performed in the order of receipt and we usually have a turn around of something like six hours. This equality of treatment for all legal staff overcomes what is a usual law office problem of junior staff finding it difficult to get their work done, or secretaries finding it convenient to do a partner's typing before that of staff solicitors or law clerks.

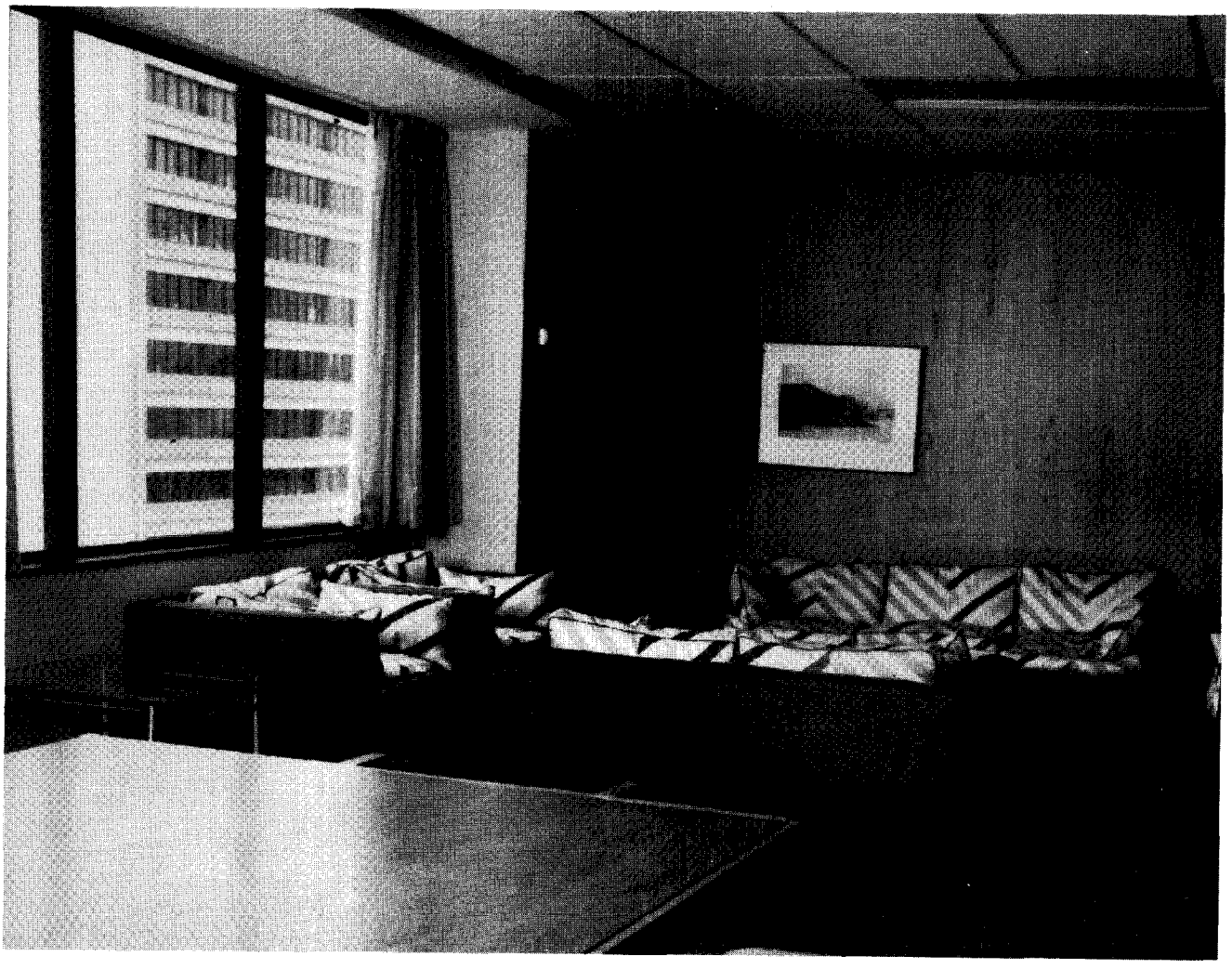
For that limited amount of work which will not wait a six hour turn around, an "urgent chit" is required, and this must be signed by any of the three partners who are on the Management Committee. This rule applies even for urgent work required by a partner. (Every so often we run a check on the percentage of work marked urgent, author by author, and usually find that one or two partners are "abusing the system" a little, and it is suggested to them that they might like to play by the rules a little more.)

●

Well I hope I've managed to reconstruct most of our chat and hope all is well with you.

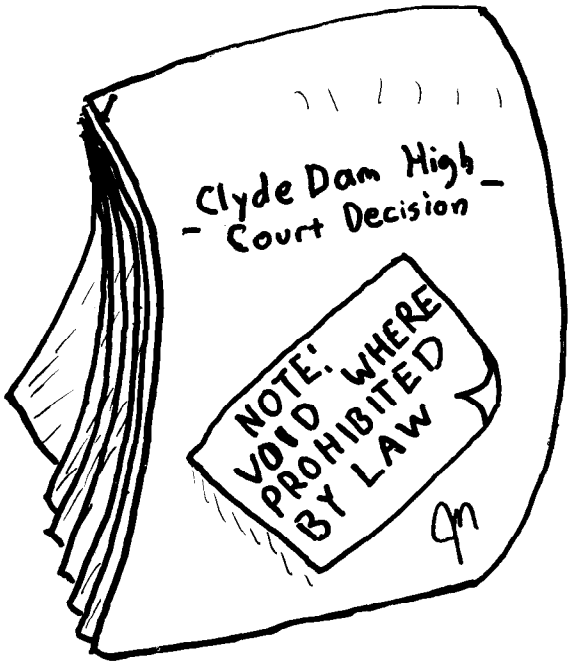
Yours,

ALAN DORMER



Your Clyde Dam Score-card

The following information has been supplied by the Coalition for Open Government — who have been keeping score



1966

Ministry of Works and Development begins detailed investigations.

1968

May Minister of Electricity assures local Wanaka residents that Lake Wanaka would not be raised above normal seasonal levels.
May Clutha River Development Committee formed from representatives of local and regional authorities as an expression of concern that local and regional interests were not being included in planning.

1969

Engineering surveys for six alternative schemes are reported to the Minister. The general features of these schemes become known to the news media and are reported.

1971

Dec Henderson Committee reports on eleven major schemes or alternatives involving about 30 options or variations of schemes.

1972

Mar The Minister of Electricity (L W Gandar) issues a statement that high dams would not be built on the Clutha River and that he favours Proposal D. (*ODT* 29.3.72).
June Cabinet approves detailed investigations for Scheme D and QB (Lower Clutha). The Minister of Electricity establishes three committees:

1 The Liaison Committee (comprising Government Departments and local bodies).
2 Local Working Committee (Dunedin based government departments).
3 Steering Committee (Wellington based).

Nov Labour Government elected. Their election pledges include no dams below Roxburgh and preservation of Lake Wanaka.

1973

Liaison Committee disestablished. Clutha Valley Development Committee established (Calvert Commission).
Lake Wanaka Preservation Act passed with support from National Party opposition.

1974

May Calvert Commission reported in favour of Scheme H. This differed from Scheme F in that the high dam at Clyde was shifted to below Cromwell (DG7). The flooding effects on Cromwell and Lowburn would be as in Scheme F. At Clyde a low dam would preserve the apricot orchards in the Cromwell Gorge.
Dec Otago Daily Times criticises Calvert Commission for the fact that irrigation was not integrated into its planning but merely "tagged on".
Dec Clutha Watchdogs criticised DG7 and want the height reduced from 195m msl to 174m msl, thus preserving horticultural land at Lowburn.

1975

Feb Otago Daily Times warns that the Clutha will again emerge as an election issue.
May Ministry of Works Chief Power Engineer quoted as saying "There is no talk of a high dam being built on the Clutha at Clyde instead of below Cromwell, as far as I know. . . ."
Sept Commission for the Environment presents its audit of the MWD Environmental Impact Report. The audit includes a list of specific matters which should be taken into account to achieve multiple purpose development of the Clutha River. The Audit also included the observation that overall planning should take particular account

of "the need for national power planning to recognise the need for reduced growth."
Sept The Prime Minister (Mr Rowling) announces Governmental approval for Scheme H. The Commission for the Environment's request for a reappraisal was judged to be not justifiable.
Nov The Leader of the Opposition (R D Muldoon) announces that if elected a National Government would establish a Clutha Valley Authority, a major function of which would be to receive public recommendations on the multiple use of the Clutha river. A National Government would urgently review the decision to build DG7 at its proposed height.
Nov National Government elected. Mr Warren Cooper (newly elected member for Central Otago) states "I have stated quite clearly that I want the dam (DG7) lowered to 570ft (174m) and my views won't change now that I am elected."

1976

March The Government announces its intention to review proposals for Clutha River development but indicates that it will not establish a Clutha Valley Authority.
April Nature Conservation Council asks the Government to lower the height of DG7.
May The Government establishes an ad hoc committee of local interests to advise the Minister of Works on proposals for Clutha River hydro-electric power development.
Nov Clutha Valley Advisory Committee recommends Scheme H as the best of the three options studied. Scheme H would sacrifice some power, create little disturbance to orchards in the Cromwell Gorge but would flood Lowburn and part of the town of Cromwell. The *Otago Daily Times* noted in its editorial "The basic mistake was made many years ago and the Clutha Valley Advisory Committee has had little to do but decide which of the various possible mistakes could be lived with most easily."

In a dissenting minority report three local committee members recommended that no recommendation be made since no real alternatives had been offered. They suggested that reduced electricity forecasts and a new energy pricing policy would allow more time to fully investigate the resources of the valley.
Dec The Government decides to proceed with Scheme F (with a high dam at Clyde), against the advice of the Clutha Valley Advisory Committee and the Commission for the Environment. (This scheme requires DG3, the Clyde dam, to be built to 195m msl. This dam would flood the Cromwell Gorge, part of Cromwell, and the Lowburn area.)

1977

Jan The Otago Catchment Board asks the Government to reconsider its decision on the grounds that the proposal:

1 Floods unique orchard lands in the Cromwell Gorge.
2 The scheme is contrary to expert consultative advice.
3 It lacks a provision for the multiple use of water.
4 There had been a lack of involvement in the decision by those most affected.

Feb The Minister of Works (W L Young) refuses an invitation to attend a meeting hosted by the Vincent County Council to explain the Government's reasons for choosing Scheme F.
April The Minister of Energy (G F Gair) announces that "it will be a little while before the reasons for the Government's choice of Scheme F become adequately understood."
June The Minister of Works (W L Young) announces new road and rail works for Clutha developments and confirms that the Government would proceed through normal channels to obtain a water right. This would allow local people "to register how they feel."
June The Government authorises $12.5m for preliminary works.
July The Minister of Electricity (now Energy) applies to the National Water and Soil Conservation Authority for a water right for a hydro-electric power station at Clyde. The Authority refers the matter to the Otago Catchment Board.
July Jackson (a Cromwell Gorge orchardist) files a motion for review of the Government's decision, in the Dunedin Supreme Court.
Sept Otago Catchment Board begins hearing 209 submissions on the Crown's water right application. 206 submissions oppose the granting of water rights for a high dam.

New Zealand Royal Society presents a cost benefit analysis to show that Scheme H is more favourable than Scheme F.

The New Zealand Institute of Engineers regrets that the applicant has not carried out a cost benefit analysis of Scheme F versus other options.

Oct In a report to the National Water and Soil Conservation Authority, the Otago Catchment Board recommends against a water right for a high dam at Clyde. The Board recommends that DG3 should be lowered to 160m msl from 195m msl as applied for.
Nov Ministry of Works let $400,000 contract for Clyde road bypass.
Dec The Chairman of the National Water and Soil Conservation Authority (W L Young) announces that the Authority has overruled the Otago Catchment Board and grants a 21 year water right for a dam to be built at DG3 to 195m msl. The *Otago Daily Times* notes that the Chairman of the Authority is also the Minister of Works.

1978

Feb A number of local landowners and orchardists, together with the Otago Branch of the Royal Society of New Zealand and the Environmental Defence Society, lodge appeals with the Planning Tribunal.
April The appellants issue a writ in the Dunedin Supreme Court seeking a declaration that the Crown should not proceed with work at Clyde until the appeal to the Planning Tribunal had been heard.
April The appellants applied to the Dunedin Supreme Court for a judicial review of the decision of the Authority to grant a water right. The appeal was made on the grounds that:

1 The Chairman was also Minister of Works and that he had publicly stated his support for a high dam before the Authority made its decision.
2 The Authority had failed to take proper account of the Otago Catchment Board report.

June The Prime Minister reportedly tells the Cabinet Economic Committee of the likelihood of an electricity surplus and in that eventuality of the need to find new electricity intensive industries.
June The Crown applies to the Court to strike out the appellants' claim.
Aug The Commission for the Environment publishes its Audit of the Clyde Environmental Impact Report, finding that the "commencement of preliminary works on the project and the hearing of the water rights applications prior to the publication of the EIR seriously compromised the Commission's role. Further the Commission feels strongly that the commencement of preliminary works

at the dam site and the acquisition of affected properties prior to the resolution of the water rights appeals are wrong in principle and could place the Government in an awkward position in the event of the appeals being upheld."
Sept Crown's application is heard in the Dunedin Supreme Court.
Sept Electricity Sector forecast indicates power "surplus".
Nov Crown application is dismissed.

1979

Feb A treasury paper predicts a very large electricity surplus and indicates the implications on the development of coal gas and hydro resources. (The existence of this paper is not reported by the press until early 1982.)
April and May Somers J hears appellant's application for review of National Water and Soil Conservation Authority's decision to grant water right and their declaration that work should stop pending the outcome of the water rights' appeal.
June The National Party Conference is held in Christchurch. Mr Barry Brill, Under Secretary for Energy, suggests the development of energy intensive industries and indicates the need for "fast track" planning legislation. Delays on the Clutha project are cited as a reason for such legislation.
July Somers J decides against the appellants' claim that work should not proceed at Clyde. Somers J held that their right to appeal to the Planning Tribunal was not being interfered with by dam construction since the work being done was equally appropriate to a low dam, to which the appellants did not object.
Aug The 1979 Power Plan confirms that there is a power surplus. Concessional tariffs are offered to South Island electricity users.
Oct Somers J decides against the appellants, noting that the Act gives them the right of a full hearing before the Planning Tribunal.
Dec Registrar of Planning Tribunal fixes date in March 1980 for Clutha Valley dam appeals.
Dec Appellants file an appeal to the Court of Appeal against Somers J's decision.

1980

Jan Registrar of Planning Tribunal writes to the Solicitor General acknowledging that the Chairman of the No 2 Division of the Planning Tribunal agreed to a deferment of the proposed March hearing as requested by the Crown. "In order to answer any future implied criticism of delay by the Planning Tribunal the Chairman has requested that it be recorded that the matter has been set down for hearing when requested at the earliest available time on more than one occasion and that fixtures have been vacated at the request of the Crown."
Jan Appellants applied to abandon their appeal on the grounds that Government officials were being critical of delays, for the waiver of the Government application for costs.
July 18 The Crown acknowledges the appellants' offer and accepts appeal withdrawal, but declines to waive an application for costs.
July 22 Appellants abandon appeal to Court of Appeal.
July 27 The Government approves a plan for a second smelter. The Minister for Energy is quoted as saying "the Clyde dam will need to be finalised and the Upper Clutha dams commissioned sooner than expected."
Sept The Government and a consortium of interests (Fletcher-CSR-Alusuisse) sign a memorandum of intent for the establishment of a second smelter at Aramoana.
Sept-Oct Planning Tribunal sits in Alexandra and Queenstown. Planning Tribunal disallows evidence on the end use of power. Some evidence on the end use of power is admitted by the Tribunal but not considered by a majority of the Tribunal members in their deliberations.
Dec 16 By a 4/2 majority the Planning Tribunal dismisses the appeal and upholds the water rights for a high dam. (The two dissenting Judges write a minority report.)
Dec 22 Appellants file appeal against Planning Tribunal's decision to the High Court.

1981

June Notification of readiness for hearing filed in the High Court.

1982

May Casey J hears appeal in High Court.
May Casey J announces the High Court's decision stating that the Planning Tribunal was not correct in law in *not* considering the end use of the power. The matter is referred back to the Planning Tribunal.

The End —

or so it should be.

Lesa v Attorney-General — two views

In deference to the fact that no single person can define reality, the following two views are presented:

The Privy Council was right

Rupert Granville Glover
Lecturer in Law
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International law

IT is of little importance in the present context to argue whether Western Samoa became a German possession by occupation, cession or annexation. Whichever was the case, the practical effects were the same: after 1 March 1900, in international law, Western Samoa ceased to be independent even nominally, its citizens becoming subjects of Imperial Germany.

The 1920 League of Nations Mandate made no express provision as to nationality, although art 2 provided in part:

> 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. . . .

It is nevertheless generally agreed in international law that, without further provision, the inhabitants of a Class C mandated territory, such as Western Samoa, did not automatically acquire the citizenship of the Mandatory. The principle is expressed in non-binding resolutions adopted by the Council of the League of Nations in April 1923:

> (i) The status of the native inhabitants of a mandated territory is distinct from that of the nationals of the mandatory power and cannot be identified therewith by any process having general application.
>
> (ii) The native inhabitants of a mandated territory are not invested with the nationality of the mandatory power by means of the protection extended to them.
>
> (iii) It is not inconsistent with (i) and (ii) above that individual inhabitants of the mandated territory should voluntarily obtain naturalisation from the mandatory power in accordance with arrangements which it is open to such power to make, with this object, under its own law.

Thus, unless New Zealand saw fit to enact legislation bestowing its nationality on Western Samoans, they would remain in international law protected persons, possessing neither German nationality nor New Zealand citizenship.

That New Zealand did enact just such legislation was the contention of the appellants in the two cases of *Levave v Immigration Department* [1979] 2 NZLR 74 and *Falema'i Lesa v Attorney-General* (reported in last month's *Law Journal* at p 274).

The Judgment of the Privy Council

Falema'i Lesa's argument before the Privy Council was quite simple. She contended that, by virtue of the British Nationality and Status of Aliens (in New Zealand) Act 1928, she, having been born in Western Samoa before that Act was repealed by the British Nationality and New Zealand Citizenship Act 1948, became a natural-born British subject and a New Zealand citizen. Levave had earlier claimed a similar status before the Court of Appeal, by descent through her father, under the provisions of the British Nationality and Status of Aliens (in New Zealand) Act 1923.

The judgment of the Judicial Committee is essentially an exercise in statutory interpretation. It examines the provisions of the 1928 and 1923 Acts, as well as certain provisions of the British Nationality and Status of Aliens Act (UK) 1914, parts of which were incorporated into New Zealand law.

The substantive judgment begins with consideration of the 1928 Act and those sections of the Imperial Act which, by virtue of ss 3 and 6, it

incorporates. The relevant Imperial sections deal with naturalisation of aliens, set out the necessary requirements for this to take place, and extend British powers to the governments of British possessions. Because Western Samoa does not fall within the definition of a British possession, the Privy Council concludes that, taken by themselves, these sections could not have the combined effect of enabling a person living in Western Samoa to qualify for naturalisation. Indeed, no person who had been naturalised could remain there beyond seven years without rendering his or her certificate of naturalisation liable to revocation under the Imperial Act. Their Lordships point out, therefore, that the adoption of these Imperial sections would 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'."

This object could only be realised if s 7(1) of the 1928 Act can be said to have the effect of bringing Western Samoa within "His Majesty's dominions" for the purposes of the Imperial provisions. Section 7(1) reads:

> 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 these 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.

Since New Zealand was undeniably a part of "His Majesty's dominions" at the relevant time, the success or failure of the appellant's case turned on the interpretation given to this extended definition of "New Zealand". The Board remarked:

> Subsection (1) is in two parts separated by a semi-colon. The second part after the semi-colon 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. . . . 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 to both 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. . . .

Their Lordships held, therefore, that, in all cases concerning natural-born British subjects or aliens eligible for naturalisation, s 7(1) 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 Acts of 1928.

The Board next turned its attention to the argument that s 7(1) of the 1928 Act is confined to the naturalisation of aliens residing in the Cook Islands and Western Samoa. This was the approach adopted by the Court of Appeal when it interpreted the corresponding section in the 1923 Act in *Levave's* case. Concerning the 1928 Act, the Board commented:

> 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. . . . 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". . . .

Their Lordships, therefore, could not see how any principle of construction could enable them to hold that s 7(1) required Western Samoa to be treated as part of New Zealand for the purpose of naturalising aliens resident there, while at the same time holding that the section did not require Western Samoa to be treated as part of New Zealand for the purpose of deciding a person's status as a natural-born British subject:

> 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 as if he had been born or resident in New Zealand proper.

Having thus disposed of *Falema'i Lesa's* case, the Privy Council then turned to the reasoning of the Court of Appeal in *Levave's* case. Their Lordships acknowledged that the 1923 Act, in comparison with the 1928 Act, "presented less formidable obstacles" to a construction which would confine it to the naturalisation of aliens residing in the Cook Islands and Western Samoa. However they pointed out that the extended definition of "New Zealand" in s 14(1) of the 1923 Act is in terms identical with that of s 7(1) of the 1928 Act. Since the qualification for naturalisation depended on residence within "New Zealand", this must have included Western Samoa:

> It is necessarily implicit . . . 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.

The Board pointed out that, in referring to s 14(1) in *Levave's* case, the Court of Appeal omitted "what in Their Lordships' view are the important words, 'in the same manner in all respects'." If effect is given to these words, in the Board's opinion, it is not 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.

The Board agreed with the Court of Appeal that the resolutions of the League's Council, cited in the *Levave* judgment, could be relevant to the interpretation of the statutes in question, but this would be so only if they were of assistance in resolving ambiguity or lack of clarity in the

language common to s 14(1) of the 1923 Act and s 7(1) of the 1928 Act. Their Lordships were, however, "unable, for the reasons stated, to discern any ambiguity or lack of clarity in that language. . . ." The appeal was therefore allowed, with costs to the appellant.

Conclusion

It is important to remember that, in interpreting the relevant statutes in *Falema'i Lesa's* and *Levave's* cases, the Privy Council has not been and could not be, concerned with the debates in the Parliaments of the day. It is a well-established principle of British statutory interpretation that the Court may never look at *Hansard* for assistance in interpreting the words of an enactment or in order to ascertain the intention of the legislature. (See, for example, Lord Reid in *Beswick v Beswick* [1968] AC 58, 73-4). Where there is ambiguity the Court has available to it a range of aids to construction, including, in New Zealand, s 5(j) of the Acts Interpretation Act. However, in the present case, the Privy Council felt no need to draw upon this arsenal. Their Lordships felt the words of the enactments to be quite clear. They use such expressions as "impossible to read down"; "inescapable"; "there is no escaping that [the language] means what it so emphatically and unequivocally says". A close reading of the judgment leads the present writer to agree with them. Whatever Parliament may have thought it was getting when it enacted the 1928 Act, as a matter of logic as well as of law, it seems to have got what Their Lordships have explained.

Regarding the 1923 Act, the Board treats the Court of Appeal tactfully, but the effect of their judgment is nevertheless to disagree with that Court's decision and to doubt its interpretation of the 1923 Statute.

It should be said, finally, that this judgment will inevitably raise the perennial chorus of voices against continued access for New Zealand litigants to the Privy Council. To base objections to the final appeal Court on *Falema'i Lesa's* case would be inappropriate. There is nothing controversial about this judgment except its effect. The logic of the Board seems impeccable. To blame the Privy Council for drafting in the 1920s which failed to give effect to the intentions of Parliament would be wholly erroneous.

The Privy Council was wrong

E J Haughey, MA, LLM

ALTHOUGH the primary issue in *Lesa* has serious and far-reaching constitutional and legal implications the Privy Council has seen fit to dispose of it on a narrow point of construction. In arriving at its decision it would appear that Their Lordships have either ignored or failed to give adequate consideration to the following matters:

- The historical background to the British Nationality and Status of Aliens (in New Zealand) Act 1928 (and to its predecessor the British Nationality and Status of Aliens (in New Zealand) Act 1923, which was repealed and replaced by the Act of 1928).
- The constitutional and international legal relationships which prevailed between New Zealand and Samoa at all material times.
- The nature and scope of the legislation in question and the general scheme thereof.

Legislative history

The history of the legislation in New Zealand relating to nationality is dealt with by Parry in *Nationality and Citizenship Laws of the Commonwealth and Republic of Ireland* (1957) vol 1 609-612. At 612, he says:

> New Zealand became the Mandatory for Western Samoa in 1920. Sir John Salmond, who was then Solicitor-General, advised that the natives of the territory did not thereby become British subjects and further that there was no power to naturalise them under the [Aliens] Act of 1908, because that measure contemplated only persons resident in New Zealand nor any power to extend the Act to Samoa because of the lack of any territorial competence. His opinions (printed in League of Nations, *Minutes of the Permanent Mandates Commission*, 2nd Session 1922, 67) imply, however, that in his view s 26 of the Imperial Act of 1914 permitted the enactment of distinct and separate legislation providing for local naturalisation. In the event . . . the Act of 1923 was applied to Samoa to the extent that it ordered naturalisations. After the adoption

> of the Imperial Act in 1928 it was similarly applied. But the territory remaining outside the dominions of the Crown, any certificate of naturalisation granted in consideration of residence therein was of no effect outside Samoa and New Zealand.

In *Levave v Immigration Department* [1979] 2 NZLR 75 the Court of Appeal (Cooke, Richardson and Somers JJ) rejected a claim for New Zealand Citizenship based on the argument that all persons born within the geographical limits of Western Samoa after the coming into force of the Act of 1923 were natural-born British subjects. The judgment of the Court, delivered by Somers J, at pp 77-79 outlined the history of the legislation leading up to the conferring of the mandate. His Honour observed at p 78:

> Accordingly, at the date of the passing of the 1923 Act, Western Samoa was a mandated territory. The mandate did not cause the occupants of the territory thereby to become British subjects — see for example, *Oppenheim's International Law* (5th ed 1937) vol 1 (Lauterpacht) pp 194-195; Lewis, *Mandated Territories* (1923) 39 LQR 458, 468-472. . . .

The objects of the successor to the 1923 Act, the Act of 1928, are set out in the Preamble:

> 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, also to make Special Provisions with respect to the Naturalisation of Persons resident in Western Samoa.

For present purposes the relevant provisions of the Act are those contained in ss 3, 6, 7 and 8. Section 3 adopted Part II of the Imperial Act in question (which was set out in the First Schedule to the NZ Act and relates to the naturalisation of aliens). The Imperial Act had expressly provided in s 9 thereof that Part II was not to apply to the self-governing dominions specified therein (which, of course, included New Zealand) unless it was expressly adopted by that dominion.

By s 6 it was declared that "the several provisions of the Imperial Acts (sic) set forth in the Second Schedule to [the] Act, *in so far as the said provisions are capable of application in New Zealand*" should be "part of the law of New Zealand" (emphasis added). The Imperial legislation set out in this Second Schedule to the NZ Act comprised the whole of Part I of the 1914 Act (which dealt with natural-born British subjects) and certain portions of the "General" provisions contained in Part III thereof. It should be noted, however, that s 6 containing express provision that in this case the imported Imperial legislation is only to form part of the law of New Zealand "in so far as [it is] capable of application" in this country (including the extended definition thereof where this is relevant).

Section 7 of the 1928 Act (which re-enacts s 14 of the 1923 Act) deals with the naturalisation of aliens in the Cook Islands and Western Samoa. Subsection (1) reads as follows:

> 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 as including the Cook Islands and Western Samoa (emphasis added).

By subs (2) of s 7 the powers and other provisions contained in paras (a) to (d) thereof are made available "in the application of (the) Act" to these territories. In the case of certificates of naturalisation granted to residents of Western Samoa the restrictions provided for in s 8 are applicable.

In a key passage in their advice the Privy Council held:

> It is . . . 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. . . . If s 7(1) and (2) (of the NZ Act of 1928) had any effect at all in New Zealand law to enable aliens resident in Western Samoa to be naturalised as British subjects . . . 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 of "British possession" in s 8(1) of the Imperial Act.
>
> If this is so, and it seems . . . 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 of "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 (emphasis added).

It would appear, however, that s 7(1) does not carry with it the consequences and implications advanced by the Privy Council with regard to the Imperial legislation contained in the Second Schedule to the Act and imported into New Zealand law by virtue of s 6 thereof. Unlike the Imperial legislation contained in the First Schedule to the Act and introduced into New Zealand law by virtue of s 3 thereof, the provisions of that legislation can only form part of law of New Zealand in so far as they are "capable of application in New Zealand". It would accordingly seem to follow that legislation of this nature which relates to Samoa also cannot be imported into New Zealand by virtue of s 6 unless it too is capable of application in Samoa. The question therefore immediately arises in limine whether a provision, such as that contained in s 1 of the Imperial Act in respect of natural-born British subjects, is capable of being imported by virtue of s 6 into New Zealand law so far as Samoa is concerned. It is submitted that when proper regard is had to the considerations already set out above together with matters discussed below the answer must be in the negative.

International law

In *Salmond on Jurisprudence*, there is a most illuminating exposition of the juridical structure of the former British Empire (see 10th ed 1947, 511-522). At p 520 Salmond said:

> The legal differences between a protectorate or mandate (which is

> British territory in fact but not in law) and a British possession (which is British territory both in fact and in law) are numerous and important. It is sufficient here, by way of illustration, to say that British nationality is acquired by birth in British territory and that it is not acquired (speaking generally) by birth in a British protectorate or mandate. Similarly the annexation of foreign territory as British confers British nationality upon the resident subjects of the state from which the territory was acquired, whereas the establishment of a British protectorate or mandate has no effect in conferring British citizenship on its inhabitants. Similarly it is commonly held that the acquisition of a new British possession otherwise than by conquest from or cession by a civilised state, has the effect of introducing into that possession the English common law; whereas no such result follows from the establishment of a protectorate or mandate.

An analogous view is expressed by Sir Kenneth Roberts-Wray (who was for many years the Legal Adviser to the Colonial Office and then to the Commonwealth Relations Office) in his monumental treatise on *Commonwealth and Colonial Law* (1966). At p 57 he says:

> Inhabitants of trust territories are, and inhabitants of mandated territories were, like the inhabitants of protectorates and protected States, British protected persons. Unquestionably, therefore, they are (or were) persons under Her (or His) Majesty's protection. It would be strange if the countries to which they belong were not also (like protectorates and protected States) under the Sovereign's protection.

It is accordingly clear from these statements of the law that on the establishment of the New Zealand mandate over Samoa in 1920 the indigenous inhabitants of that territory became British protected persons and continued to have this status — at least during the period of the mandate and the later trusteeship (unless they can be shown to have acquired British nationality by naturalisation (or birth from a British father)). This situation is, of course, consistent with (and is in fact confirmed by) the nature and form of the passports, which for many years were issued to the residents of Samoa.

As the Privy Council has raised the question of the nature of the allegiance owed by the residents of Samoa it is appropriate that some reference should be made to the comments by Roberts-Wray on the question generally of "British protected persons and allegiance". (See *Commonwealth and Colonial Law*, 561-563). Roberts-Wray mentions that this topic (which is essentially a matter of Commonwealth law) needed clarification since the early authorities appear never to have been reviewed in the light of later developments. He referred to the maxim *protectio trahit subjectionem et subjectio protectionem* (*Subjectio* meaning allegiance); and expressed the view that since ex hypothesi a British protected person is under the protection of the Crown, not only when he is in his own country but anywhere in the world, it seemed to follow that he must owe allegiance, and, moreover, an allegiance which differs little, or not at all, in quality from that due from a British subject. With regard to modern developments in this field he said:

> . . . The implications of British protection have undergone significant changes since 1910, and the status of British protected persons is much closer than it was to that of British subjects. They are British nationals in the broad, international sense; and they are treated nowadays in material respects in the same way as a British subject; and any distinction in the matter of allegiance would be artificial.

The general scheme

It would appear that the general reasoning of the Privy Council in this case has been vitiated by the undue and logically illicit emphasis that they have placed on certain phrases appearing in s 7(1) of the 1928 Act (and in particular by their omission to have any regard to the matters referred to above in relation to the interpretation of s 6). These phrases in s 7(1) are no more than mere drafting expressions designed to ensure that full efficacy is given by the Act to the provisions contained therein in respect of the naturalisation of persons resident in Samoa. They are embedded in a section of the Act relating, and confined, to that particular matter. They were never intended to have (and do not in fact have) the meaning and effect now attributed to them by the Privy Council. In their judgment in this case the Court of Appeal said that the Acts passed by the New Zealand Parliament in 1923 and 1928 were not intended to make all people born in Western Samoa in the future British subjects. Indeed, said the Court:

> We think it inconceivable that the legislature had any such intention.

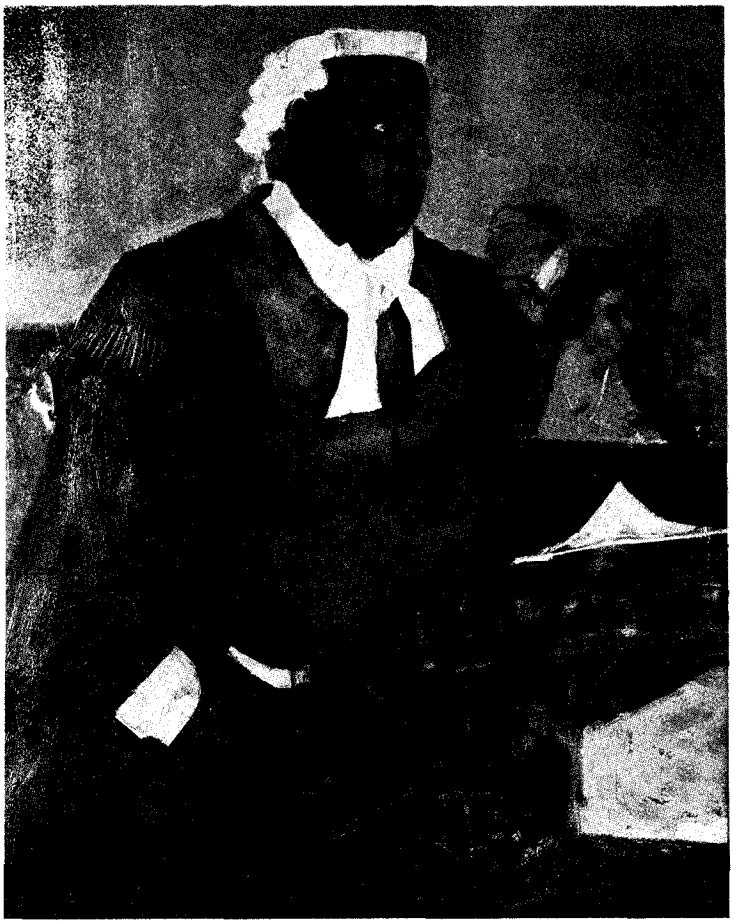
On their view of the legislation governing this case the Privy Council have, however, arrived at the conclusion that a person born or resident in Western Samoa is to be treated in the same manner in all respects for all the purposes of the Act of 1928 as if he had been a resident in New Zealand proper. This conclusion is in the circumstances completely at variance with the well-known legal presumption against "implicit alteration" of the law. In Maxwell on the *Interpretation of Statutes* (12th ed, 1969, p 116) this presumption is referred to in the following terms:

> Few principles of statutory interpretation are applied as frequently as the presumption against alterations in the common law. It is presumed that the legislature does not intend to make any change in the existing law beyond that which is expressly stated in, or follows by necessary implication from the language of the Statute in question. It is thought to be in the highest degree improbable that Parliament would depart from the general system of law without expressing its intention with irresistible clearness, and to give any such effect to general words merely because this would be their widest, usual, natural but literal meaning would be to place on them a construction other than that which Parliament must be supposed to have intended. If the arguments on a question of interpretation are "fairly evenly balanced, that interpretation should be chosen which involves the least alteration of the existing law".

The net upshot of the present case is that the Privy Council have misconstrued the relevant New Zealand legislation and imputed to the Parliament of New Zealand an intention which it never had.

The Tapper Gallery

In 1980, Auckland artist Garth Tapper staged a highly successful exhibition of the Denis Cohn Gallery. Entitled "The Law and its People", the two paintings featured on this page are representative of the collection. There will be a further exhibition at the same gallery 27 Sept - 8 Oct. At the time of going to press, it is not known whether the exhibition will include additional portraits of the profession, though it is certain Tapper's new paintings will attract widespread attention.



Loan contracts — three articles

In this section, loan contracts are examined from two perspectives — that of inflation and that of legislation.

In the first article, the authors examine the precarious position of lenders arising from the realities of progressive inflation, and suggest ways of ameliorating its effects through the insertion of express contractual provisions. These provisions would protect the current purchasing power of money loaned by attaching its value to an outside index, such as the exchange rate of a more stable currency. The authors go on to examine indexing arrangements in light of tax laws, and note the hidden reefs and shoals in steering a clear course.

In the second article, the author examines oppressive credit contracts in terms of earlier judicial interpretation of words and phrases now contained in the Credit Contracts Act 1981. The brief historical discourse is intended for the benefit of those not wishing to have their credit contracts re-opened.

The final article provides guidance for keeping within the disclosure requirements of the Credit Contracts Act.

If there is a unifying theme to the three articles, it is that now more than ever careful planning and meticulous attention to detail are necessary to the preparation of the loan contract.

Countering inflation in loan contracts

L M Austin M Com ACA
G G F Viskovic LLB Dip Tchg

Introduction

THE present annual rate of inflation in this country is nearer twenty than ten percent. Rates of inflation that are over six percent per annum are, quite properly, seen as being serious in their effects upon an economy.

The true basis of our monetary system is the confidence which the public has in it. Continuing high inflation clearly erodes this confidence and, thus, endangers the stability of the whole system. Our inflation is in a class which could be described as high when compared with the rates which our trading partners are suffering. It is predicted that it will continue at much the same level.

One of the main results of high inflation is that it reverses the situation in which people with fixed incomes and creditors are better off than those with flexible incomes and debtors. In such circumstances people try to get some kind of a "hedge" against inflation. In doing so they tend to convert their monetary resources into assets such as real property, art works, jewellery and minerals. They come to think that it is advantageous to owe as much money as possible because inflation gives debtors unjustified benefits and unfairly penalises lenders. It is, therefore, harder to attract institutional or private lending at fixed rates of interest for any reasonable term.

In addition, interest rates themselves are forced upwards as lenders include in them not only a fair commercial charge but also an allowance to compensate themselves for the erosion of the purchasing power of the principal sum they lend during the currency of the loan. These were the opinions of the 1980 Wilson Committee in the UK which concluded:

> We have suggested experimentation with the use of index-linked industrial bonds, and that the fiscal and other obstacles which at present inhibit this should be removed.[1]

In this article we intend looking into at least some of these "fiscal and other obstacles" as they apply to the New Zealand situation. We also believe that many of the difficulties can clearly be eased by thought in the drafting of contracts and trust deeds. In addition, we intend looking at some of the practical and legal implications of inserting express provisions in contracts with the aim of ameliorating the problem. This would be done by equating the money placed at risk with its current purchasing power and then protecting that purchasing power.

Contractual provisions

Are express provisions necessary to deal with the problems of inflation? It is necessary to consider this question in relation to the Credit Contracts Act 1981. Section 10 empowers the High Court (or a District Court in some cases) to re-open any credit contract, if the Court considers:

(a) The contract is oppressive.
(b) A party under the contract has exercised or intends to exercise, a right or power in an oppressive manner.
(c) A party has induced another party to enter into the contract by oppressive means.

Section 9 defines oppressive as meaning "oppressive, harsh, unjustly burdensome, unconscionable, or in contravention of reasonable standards of commercial practice." This section is qualified by s 11(1) which provides that a contract will not be oppressive if it would not have been considered oppressive at the time it was made or carried out. In deciding if a credit contract should be re-opened the Court may have regard to such matters as it thinks fit, but s 11(2) directs the Court to have regard to (amongst other matters) whether the finance rate or any amount payable by the debtor, is oppressive. The Moneylenders Act 1908 provided that an interest rate of over 48 percent was excessive. This rate was not repeated in the Credit Contracts Act and

in fact no limit was provided to the finance rate in the Act. It would be difficult to argue that a loan which provided for a premium on repayment (to counter the effects of inflation) is "in contravention of reasonable standards of commercial practice". The New Zealand Society of Accountants publication CCA 1 requires listed companies to present (supplementary) annual financial accounts which show the effect of inflation. This is done by applying specific indices to the components of expense in the Profit and Loss Account and Balance Sheet. The essential result is an "indexed profit". Likewise the 1982 McCaw "Task Force on Tax Reform" advocated the introduction of indexed loan contracts.[2] Several public issues of debentures have offered loans which provide for a premium on repayment, and this type of loan is used widely overseas.

Whether a loan which has been made more onerous by inflation on repayment is "oppressive, harsh, unjustly burdensome or unconscionable" has been considered in a number of cases and judicial comment.

Whilst the terms of a contract are normally limited to those expressly adopted by the parties, in some circumstances the Courts have brought other terms into contracts. These are referred to as "implied terms". Could a provision dealing with the effects of high levels of inflation possibly be brought into a contract under the doctrine of the implied term?

Halsbury[3] states the position as follows:

> If there is any reasonable doubt whether the parties did intend to enter into such a contract as is sought to be enforced, the document should be looked at and all the surrounding circumstances considered; and, if the document is silent and there is no bad faith on the alleged promisor, the Court "ought to be extremely careful" how it implies a term. It is not enough to say that it would be reasonable to make a particular implication; nor that it would make the carrying out of the contract more convenient; nor that it is consistent with the express provisions of the contract or with the intentions of the parties as gathered from those provisions; nor will a term be implied where a contract is effective without the proposed term, a term ought not to be implied unless on considering the whole matter in a reasonable manner it is clear that the parties must have intended that there should be the suggested stipulation. The Court has no discretion to create a new contract. The Court is not entitled thereby to qualify the contract for the purpose of doing what seems to it just and reasonable.

Any remedy against the disadvantageous effects of acute inflation would thus have to appear in the form of express provisions in the contract. Even if inflation increased to the extent that it could be classified as "galloping" or "hyper" inflation, the Courts would not intervene. In *British Movietonews Ltd v London and District Cinemas Ltd*[4] Lord Loreburn said that "The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate — a wholly abnormal rise of all in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. Yet this does not in itself affect the bargain they have made."

Our Courts will clearly not use the doctrine of the implied term to ameliorate the effects of high inflation as things stand at present neither do the effects of inflation on contractual obligations appear to fall within any of those types of impossibility of performance which make up the doctrine of frustration of contract in our law.[5]

In *Davis Contractors Ltd v Fareham Urban District Council*[6] an unexpected turn of events rendered performances of a building contract far more onerous than the parties anticipated it would be when they made it. The Court held that this circumstance did not cause the contract to be frustrated because frustration only takes place where: "without default of either party a contractual obligation has become incapable of being performed because the circumstance in which performance is called for would render it a thing radically different from that which was undertaken by the contract."[7]

Commercially practicable agreements

The only effective way of dealing with this problem, in the absence of legislative intervention, is therefore plainly to insert appropriate express provisions in our contracts. It is strongly suggested that it is part of the duties of professional advisers to clients engaged in negotiating contracts to point out the effects that they can foresee being wrought on the obligations undertaken by future fluctuations in the value of the currency and to suggest suitable provisions aimed at achieving commercially practicable agreements when inserted in the contract documents when these are eventually completed.

Foreign currency — theoretical possibility

In doing this the planners should remember s 6 of the Decimal Currency Act 1964[8] which, by providing:

> Every sale, payment, bill of exchange, promissory note, and security for money, and every contract, agreement, deed, instrument, transaction, dealing, matter, and thing whatsoever relating to money or involving the payment of or a liability to pay any money, that is made, executed, entered into or done in New Zealand shall be made, executed, entered into or done according to the currency of New Zealand provided for by this Act, unless it is made, executed, entered into or done according to the currency of a country other than New Zealand.

makes it theoretically possible for a contract to be made and performed by New Zealanders in New Zealand which is expressed in the currency of another country.

It follows that one way of attempting to deal with the problems of the effect inflation has on long-term contracts would be to express such contracts in a currency which has proved itself more resistant to inflationary pressures than has ours. Such provisions could not be drafted without careful planning because of difficulties inherent in their nature. Their practical usefulness is somewhat curtailed by regulations imposing exchange controls. They still could be used to ease the situation.

Indexing to a foreign currency — a more practicable approach

It is, however, far more easily possible to use a more stable currency to preserve the purchasing power committed to a particular contract. This can be done by using the more stable currency as a comparative base against which to gauge the purchasing power of the capital involved. This would

preserve the old distinction between gold clauses and gold value clauses.

One example of a clause that could be inserted in a mortgage to achieve this aim would be:

> It is a condition of the advance of the principal sum and it is hereby agreed that any sum to be paid hereunder on account of interest or in repayment of the principal sum or other moneys hereby secured shall be increased or decreased proportionately if at the close of business on the day preceeding the day on which payment is made the rate of exchange between the pound sterling and the New Zealand dollar shall vary by more than three percent from the rate of 0.4179 pounds to one dollar prevailing at the date hereof.[9] For this purpose the rate of exchange means the buying rate applied by the Bank of New Zealand Limited on the day in question, and a written confirmation of this rate issued by the said Bank of New Zealand Limited shall be final and binding on the parties for the purpose of this (mortgage).[10]

As the buying rate for overseas currencies is common to all five trading banks and is set for them by the Reserve Bank of New Zealand such a clause could be drafted in a variety of forms. Its basic element is, however, that the purchasing power of the principal sum is preserved by "indexing" it to another currency. The result, in dollar terms, is that the amount to be repaid may either increase, which is highly likely, or decrease, which at the time of writing appears improbable.

This type of artifice may be used in a wide variety of contracts amongst which are contracts of employment, leasing agreements, agreements creating annuities, and royalty agreements. We will limit our discussion to contracts of loan so that our comments do not become too discursive.

Indexing and the loan contract

A common practice adopted by lenders in an effort to protect themselves against the erosion of the purchasing power of their capital has been to charge higher rates of interest than they previously did. One example of this tendency is to be seen in a reported "increase in the average interest rate charged on moneys lent through solicitors" trust accounts in one year of two percent.[11] The reaction of the Revenue in taxing these increased interest receipts has been largely instinctive. Lenders would therefore benefit if they could charge a lower, but commercial, rate of interest while protecting their capital from intention by some form of indexation. Many devices have been used. A typical indexation clause links the repayment of principal to the consumer price index, but other mediums have and are being used, for example the exchange rate of the New Zealand dollar with a selected currency (outlined above) or the dollars necessary to buy a quantity of a selected commodity. Whatever method of escalation is chosen it must be unambiguous, and any changes in the measurement base must be anticipated in the agreement.

A borrower on mortgage could not escape from the commitment represented by either the indexation or premium provision on the ground that it was a clog on his equity of redemption. It may represent a hard bargain but it is not essentially unfair so the Courts would enforce it.[12]

Effect of tax on indexing arrangements

We must next consider the taxation implications of such arrangements. The Income Tax Act 1976 gives no guidance on the treatment of inflation as it affects income. The Act neither defines income nor stipulates how it is to be calculated.

Generally, the Courts have been reluctant to allow any reduction of assessable income to counter the effects of inflation. In the calculation of profits, no adjustments have been allowed. In *Secretan v Hart*[13] it was argued that a capital gain of £78,771 arising from the sale of shares should be decreased by the decline in the value of the pound between the dates when the shares were purchased, in 1932-1944, and the date when they were sold, in 1967. Specifically, it was claimed that the purchase price "ought to be multiplied by a suitable factor to take account of the change in the value of the pound. . .".

The claimed adjustments for inflation were disallowed in a decision which centred around the argument by Buckley J that "if the intention had been that if the effects of the inflation were to be taken into account in determining whether or not a capital gain had been made, and the amount of such a gain, there would clearly have been in the Act some explicit statement to that effect, and some machinery provided for ascertaining the effect of inflation on the relevant considerations. There is nothing in the Act of that kind". This decision is not surprising because the English statute provided a specific formula to be used in calculating the assessable profit.

The *Secretan* decision was followed in the New Zealand case of *Lowe v CIR*.[14] In this case profits from land bought in 1961, subdivided within ten years, and sold after 10 August 1973 were caught by the equivalent of s 67(4)(e) of the Income Tax Act 1976.

In their objection the plaintiffs argued that the profit, if it *were* assessable income, should be adjusted for inflation. Five questions requiring answers were posed. The first four dealt with whether the gain was assessable income at all. The fifth question asked "whether the objectors are correct in their contention that the calculation of that taxation profit or gain ought to be amended to take into account the effect of inflation?"

It was argued that as the Act does not define "income" nor provide a method for the calculation of income it contains nothing to preclude inflation adjustments being made. It was argued that the decision in *Secretan v Hart* was irrelevant for this reason. Taxation of profits which include an inflationary gain would constitute a tax on wealth, and income tax is confined to taxing income. The plaintiffs' additional point that the word "profit" should be used in its accepted business sense was countered by reference to the commercial practice of *not* incorporating current cost accounting when assessing "profit". This practice was seen as being probable at the time of the hearing, at least in the annual reports of companies. The following statement was made by Roper J:

> In the decided cases under s 88(1)(c) or its Australian equivalent, the profit from the sale of land by a person not in the business of dealing with land, has always been computed on the basis of purchase price, and it would be a bold step to depart from that accepted and well-established basis. Like Buckley, J, whose reasoning I adopt, I feel sympathy with the objectors, but feel unable to come to the conclusion that their view is the correct one. I therefore answer "No" to the final question.

The New Zealand Court of Appeal concurred with this decision, adding

that the determination of an appropriate index and the complications arising from having to assess price level gains "would surely require legislation."[15]

An exception to the general exclusion of price level allowances to profits in calculating assessable income lies in certain inflation adjustments in loan agreements both for commercial securities and private loans.

Naturally, any escalation of a receipt which is normally taxable will be assessed. Likewise, any moneys payable over and above the original sum lent will be taxable if the recipient is in the business of lending money see s 65(2)(e) of the Income Tax Act 1976. This will still be the case even if part of the return is specified as an inflation allowance, because "It is part of his business to take capital risks".[16]

In the case of other "ad hoc" lenders the assessability of the excess received over the amount lent must be satisfactorily reconciled for tax purposes. "There can be no general rule that any sum which a lender receives over and above the amount which he lends ought to be treated as income".[17]

The Lomax case

The leading case dealing with this situation also discusses the general principles distinguishing between the revenue and capital nature of such returns is *Lomax v Peter Dixon & Co Ltd.*[18] In that case a debtor company (which was a wholly owned subsidiary) issued 680 freely assignable notes of £500 to Peter Dixon & Co Ltd on 11 November 1953 in satisfaction of a debt of £319,600. In other words, notes worth £340,000 were issued to satisfy an accumulated debt of £319,000. The difference of £20,400 was, effectively, a discount of 6 percent on the issue of the notes.

The notes were issued on the following conditions:

(1) Interest was payable at one percent above the lowest discount rate of the Bank of Finland during each year, but in no case higher than 10 percent.
(2) Notes numbers 1 to 100 were to be repaid on 15 November 1953, that is, immediately. This left 580 to be repaid, of these, 29 notes were to be repaid on 6 April in each of the following 20 years.
(3) Each note was to be redeemed at a premium of 20 percent if, in the year before its redemption, the net profits of the borrower reached a specified level.

The effects of these conditions were that (a) the interest rate varied annually and, during the years in question, it was about 5 percent and (b) the combined return of interest and premium gave a yield of about 7 3/4 percent on the amount outstanding.

The Court was called upon to decide whether the "discount" on issue and the "premium" on repayment of the notes were to be treated as income or capital payments for income tax purposes. A distinction was drawn by the Court between allowances for capital risk and interest. Capital risk, in this context, refers to the possibility of loss of capital either by non-payment *or* by the fall in the purchasing power of the money lent during the term of the loan.[19]

If an allowance for these capital risks is made simply by increasing the rate of interest charged, then it will be taxable. However, if, for example, the allowance for capital risk is made as a discount on issue or a premium on repayment (or a combination of the two) then, *provided that a commercial rate of interest is payable*, the allowances will not normally be assessable.

Lord Greene, MR expressed the position in these words:

(1) Where a loan is made at or above such a reasonable commercial rate of interest as is applicable to a reasonably sound security, there is no presumption that a "discount" at which the loan is made or a premium at which it is payable is in the nature of interest.
(2) The true nature of the "discount" or the premium (as the case may be) is to be ascertained from all the circumstances of the case.
(3) In deciding the true nature of the "discount" or premium, in so far as it is not conclusively determined by the contract the following matters, together with any other relevant circumstances are important to be considered, viz, the *term* of the loan, the *rate of interest* expressly stipulated for, the *nature of the capital risk*, the extent to which, if at all, the parties expressly took, or may reasonably be supposed to have taken the capital risk *into account* in fixing their terms of the contract.[20]

This final point is taken up by Lang,[21] who suggests that an *ad hoc* lender in an escalated transaction would strengthen his position by making sure that the purpose of the premium is stated explicitly, and by providing that interest is payable at a reasonable commercial rate.

Any premium charged would have regard to the capital risk caused by the prevailing rate of inflation. He suggests the use of a clause such as the following:

> *Whereas* this loan has been negotiated during a period of gradual reduction in the purchasing power of money *and whereas* to secure to the mortgagee a similar purchasing power in respect of the principal sum at the date of repayment as at the date of making this loan the mortgagor has agreed to repay the principal increased or decreased in accordance with the "index number" as hereafter defined ———

However, as discussed later, it may be necessary to incorporate a fixed dollar premium in order for it to be deductible to the borrower.

If no interest is charged on the loan, any discount or premium would, normally, be assessable. This was established in *Davies v Premier Investments Co Ltd; Hewetson v Carlisle*[22] in which no-interest notes were repayable at a premium. The Court held that the premium was taxable.

If interest is charged at less than a commercial rate on debentures issued at a discount or repayable at a premium, the Court will apparently adopt what could be called a "yield approach". In other words, if the low interest combined with the extra return created by the discount or premium yields a commercial interest rate or less *both* elements will be taxed as interest. So, in *CIR v Thomas Nelson & Sons*[23] notes were issued which bore interest at 3 percent, a rate considerably below a commercial one, and which were repayable at a premium. Together, the interest and the premium would have yielded between 5 and 5 1/2 per centum per annum, which was considered a reasonable commercial rate. This fact, combined with the size of the premium which varied with the date of note repayment "stamped the premium with a revenue character".

It is not clear how an intermediate case, where debentures issued at a lower than commercial interest rate yield a higher than commercial rate after the gain represented by a discount on issue or premium on redemption is included, would be treated. It is submitted that this would constitute a situation where an apportionment of the discount or premium would be justified.

Lomax and current commercial practice

This situation is not just a theoretical one as, apart from the Government "Inflation-proof Bonds", a number of debenture issues incorporating premium payments have been made in recent years. Examples include the Government 4/10 12 percent "premium stock" issue, the UDC 14/30 14 percent Call Bond issue and the 1980 DFC issue of 12/20 12 percent Call Bonds. This last is a good example of the necessity to distinguish the capital and revenue nature of the premium payment. The premium of 20 percent is payable if the bonds are held until maturity in 1984, but they are at call until that date carrying interest fixed at 12 per centum per annum. This presents an added complication which did not, for example, arise in *Lomax* as the rate in that case in varying with the bank rate was presumably close to a reasonable commercial rate each year. In the case of the DFC Bonds, should the commercial rate for call securities be calculated at (say) 14 per centum per annum in the period, then half the premium paid to *ad hoc* lenders could be apportioned to capital, and half would be required to make a commercial rate. On the other hand, in the event of a reasonable commercial rate for such securities being calculated at 12 per centum per annum over the period, then, following from the above, the total premium would be likely to be a capital receipt to the (*ad hoc*) recipient. The premium is not likely to be caught under s 65(2)(ja) of the Income Tax Act 1976 as a benefit paid for money advanced (which includes the forebearance of any debt) as that section envisages a benefit, such as a premium, which is charged in the place of a current commercial rate of interest. As these bonds bear interest at commercial rates, it is likely that the premium would not be included as "a benefit". This discussion frankly begs the question of how to calculate a reasonable commercial rate which is defined in neither the taxing Acts nor the decided cases thereon.

Deductibility to borrower

The discount on an issue of debentures is a capital sum and is thus not deductible to the payer. This statement is supported by the judgments in *Felt & Textiles Ltd v CIR*[24] where it was said that a discount of 1 percent offered on an issue of debentures ". . . cannot be said . . . (to be) . . . an additional payment or obligation for payment of interest on the money borrowed. It has not the element of an annual payment for the use of money".

A borrower might be allowed to deduct a premium under s 136 of the Income Tax Act 1976 which permits, as deductions, expenses incurred in the borrowing of new loan money as well as procuration fees. The deduction is allowable in the year in which the expenditure is *incurred*. The word "incurred" does not necessarily mean that the moneys be disbursed, as "a deduction may be allowed under (s 136) . . . in respect of expenditure incurred although there has been no disbursement if the taxpayer is, in the relevant income year, *definitely committed* to that expenditure."[25]

It would seem that the borrower should require the insertion in the loan agreement of an express provision that he contracts to pay a fixed dollar premium as one of the conditions of his obtaining the loan. The payment of the premium could be deferred to the maturity date of the contract as long as the borrower was clearly bound from the outset to pay the premium and as long as the agreement to pay the premium was an essential inducement for the lender to advance the sum borrowed. The premium would need to be a certain (fixed) amount in order to come within s 136. Thus the lender, seeking to protect the purchasing power of his principal from inflation's erosion, could charge a premium based on the estimated inflation rate which would be deductible on the borrower's side in the year in which contract of loan was made. Section 136 would thus appear to convey a double benefit to the borrower as the premium would be deductible for tax purposes at the beginning of the loan whilst being payable at the end of its term. One writer claims that the premium is allowable as a deduction over the term of the loan.[26]

As deductions under s 136, are allowable at the discretion of the Commissioner, it would probably be necessary to establish both that the premium did not incorporate any element of interest and that its payment was necessary in order to obtain the loan. The loan would also, probably, need to carry a reasonable rate of interest, although there appears to be no New Zealand case on this point.

Conclusion

Clearly, lenders and their professional advisers could do much to ameliorate the effects of inflation on their capital by using the opportunities available to them under the existing law.

1 *Committee to Review the Functioning of the Financial Institutions* (Chairman Sir Harold Wilson), London HMSO, 1980, Cmnd 7939 para 1407.
2 *Report of the Task Force on Tax Reform* (Chairman P M McCaw) Govt Printer, 1982, Paras 7.31 and 7.32.
3 *Halsbury's Laws of England* Vol 9 (4th ed) paras 356 and 357.
4 [1952] AC 166 at 185.
5 Cheshire & Fifoot *Law of Contract* (5th NZ ed) by J F Northey Butterworths (1979) pp 476 and 477.
6 [1956] AC 696 (HL).
7 Ibid at p 729 per Lord Radcliffe.
8 Reprinted Statutes of New Zealand, Vol 2.
9 This exchange rate applied in December 1980.
10 After the clause in *Multiservice Bookbinding Ltd v Marden*, [1968] 2 All ER 489 at 493.
11 "Northern News" No 1, 1981.
12 *Multiservices Bookbinding Ltd v Marden* (supra).
13 [1969] 3 All ER 1196.
14 3 TRNZ 217.
15 [1981] 1 NZLR 326 per Richardson J.
16 *Lomax (HM Inspector of Taxes) v Peter Dixon & Co Ltd* [1943] 2 All ER 255 at 260.
17 Ibid.
18 See 16.
19 The fall in purchasing power of the amount to be repaid is included in the definition of "capital risk" by Hansen, B C in *Income Tax — Combatting the Effects of Inflation in Loan Transactions* [1973] 6 VUWLR 382, by Lang, A G in *Inflation as it affects Commercial and Legal Transactions* (1974) p 51, and by Malloy, *A P Malloy on Income Tax* Butterworths (1976) p 219. In addition, Lord Greene MR discussed capital risk when contracts were linked to the price of gold in *Lomax* (above at p 260A).
20 At 262.
21 Lang A G *Inflation as it affects Commercial and Legal Transactions* (1974) West Publishing p 81.
22 [1945] 2 All ER 681.
23 (1938) 22 TC 175.
24 *Felt and Textiles Ltd v CIR*, [1969] NZLR 493.
25 *King v CIR* (1973) 4 ATR 188; *FCT v James Flood Pty Ltd* (1953) 5 AITR 579; *Case 18* (1964) 2 NZTBR.
26 CA Staples *A Guide to New Zealand Income Tax Practice* (41st ed) para 852.

Oppressive credit contracts

D O Jones, Barrister and Solicitor

PART I of the Act deals with oppressive credit contracts and the right of a Court to re-open such contracts. This is not a novel concept. It was developed by the Courts over the last three and a half centuries, particularly in the 19th century[1] and it formed the basis of similar unconscionable bargain provisions contained in the Moneylenders Act 1908.

Section 3 of the Moneylenders Act relating to the re-opening of transactions of moneylenders was really the backbone of that piece of legislation, and few were aware that the section applied not only to "moneylender" transactions but also to all those instances where loans were made by persons not necessarily in the business of moneylending but who lent money at a rate exceeding 10 percent per annum.[2] Under s 3 of the Moneylenders Act the Court could re-open not only harsh and unconscionable transactions but also those where excessive interest was charged. This is to be compared with the English provisions (now repealed by the Consumer Credit Act 1974), where excess of interest alone was not enough to attract the re-opening provisions. In addition the contract had to be harsh and unconscionable.[3] The Contracts and Commercial Law Reform Committee found this aspect of the Moneylenders Act relatively effective, but criticised its limited scope and recommended that the doctrine be applied to all types of credit contracts. This recommendation has been incorporated in Part I of the Act.

Definitions

Section 9 of the Act defines "oppressive" as meaning:

> oppressive, harsh, unjustly burdensome, unconscionable, or in contravention of reasonable standards of commercial practice.

This definition is to be compared with s 3 of the Moneylenders Act which authorised the Court to re-open "harsh and unconscionable" transactions. An examination of dictionary meanings of the words contained in this definition (which are required to be read disjunctively) reveal that many of the words are interchangeable. Individually the terms contained in the definition have been used and examined by the Courts over a considerable number of years, particularly in the context of unconscionable bargains. Undoubtedly a Court in applying the definition of "oppressive" will look for assistance to these cases:

Oppressive has often been interchanged by the Courts for the word "unfair".[4] The terms "fair and fairness" have not been defined by the Courts although in the recent case of *Archer v Cutler*[5] McMullen J did give consideration to the meaning of these words:

> . . . although the concept of fairness has not been captured in any particular phrase, a number of indicia have been suggested to test its presence. The test of an unfair bargain in *York Glass Co v Jubb*[6] was said to be judged by the following:
>
> (i) No independent advice.
> (ii) Price was greatly in excess of the value.
> (iii) No reasonable degree of equality between the contracting parties.

Harsh will, it is submitted, be interpreted largely along the same lines as "oppressive".

Unconscionable: In *Archer v Cutler*[7] McMullen J referred to the case of *Blomley v Ryan*[8] where Kitto J said of the jurisdiction of the Court to set aside unconscionable bargains:

> This is a well-known head of equity. It applies whenever one party to a transaction is at a special disadvantage in dealing with the other party because, illness, ignorance, inexperience, impaired faculties, financial need or other circumstances affect his ability to conserve his own interest, and the other party unconscientiously takes advantage of the opportunity thus placed in his hands.

In the same case Fullagar J said:

> The circumstances adversely affecting a party, which may induce a Court of Equity either to refuse its aid or to set a transaction aside, are of great variety and can hardly be satisfactorily classified. Among them are poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary. The common characteristic seems to be that they have the effect of placing one party at a serious disadvantage vis a vis the other. It does not appear to be essential in all cases that the party at a disadvantage should suffer loss or detriment by the bargain. . . . Inadequacy of consideration, while never of itself a ground for resisting enforcement, will often be a specially important element in cases of this type. It may be important in either or both of two ways: firstly as supporting the inference that a position of disadvantage existed, and secondly as attempting to show that an unfair use was made of the occasion.

In *Multiservice Bookbinding Limited v Marden*[9] Browne-Wilkinson J came to a similar conclusion:

> In my judgment a bargain cannot be unfair and unconscionable unless one of the parties to it has imposed the objectional terms in a morally reprehensible manner, that is to say, in a way that affects his conscience. The classic example of an unconscionable bargain is where advantage has been taken of a young, inexperienced or ignorant person to introduce a term which no sensible well advised person or party would have accepted. But I do not think that the categories of unconscionable bargains are limited: the Court can and should intervene where a bargain has been procured by unfair means.

His Honour further added, after examination of a number of cases, that "mere unreasonableness does not make a term oppressive or unconscionable".[10] This was illustrated in his decision to the extent that while finding a term of the subject contract unreasonable he did not see anything unfair or oppressive or morally reprehensible in such a bargain in the circumstances. This is an

important consideration to bear in mind when interpreting the meaning of "oppressive" as it will limit the width of the terms used in the definition, contained in s 9 of the Act.

In contravention of reasonable standards of commercial practice. These words will probably be interpreted as an updating of the language used in *Samuel v Newbold*[11] in giving a meaning to the words "harsh and unconscionable", viz, "not in accordance with the ordinary rules of fair dealing".

Re-opening the oppressive contract

Sections 10, 11 and 12 cover the Court's power to re-open oppressive credit contracts and set guidelines for their re-opening and limits the time frame within which proceedings can be brought. The following points are worthy of note:

(a) Section 10(2) deems a party to be exercising a right or power under the contract if he refuses to agree to the early termination of a contract or to vary or waive any term of the contract, or imposes conditions on such agreement. This is important because one of the grounds upon which a Court may re-open under s 10(1) is where a party exercises a right or power in an "oppressive" manner. The section will require to be read in conjunction with the guidelines set out in s 11.

(b) Section 10(3) authorises a Court which has re-opened a credit contract to re-open other credit contracts (not necessarily oppressive) where credits under them have been used to satisfy amounts due under the re-opened credit contract or where amounts due under a credit contract have been paid from credit provided under the re-opened credit contract. All creditors under these credit contracts are required to be the same or related bodies corporate.[12]

(c) Section 11(1) states no more than the law existing prior to the Act, namely, that oppression will be considered in the circumstances applying at the time when the contract was made. This concept has been reiterated on a number of occasions by the Courts. In the *Multiservice Bookbinding case* Browne-Wilkinson J summed this up in the following words:

> In opening, the plaintiffs advanced the contention that even if at the date the mortgage was entered into it was unobjectionable the Court would not now enforce it in its rigour because the dramatic fall in the value of the pound was not foreseen in 1966 and hardship would be caused to the plaintiff. I am not sure that such contention was persisted in, but I know of no such dispensing power vested in the Court and I agree . . . that, if there was such a power, the doctrine of frustration of contracts and all the legal difficulty that it has caused would have been unnecessary. A contract is not frustrated just because the parties had not foreseen the event which occurred, but only if the provisions of the contracts do not cover that event.

Again, Lord Hodson in *White & Carter (Councils) Limited v McGregor*[13] stated:

> It is trite that equity will not rewrite an improvident contract where there is no disability on either side. There is no duty laid upon a party to a subsisting contract to vary it at the behest of the other party so as to deprive himself of the benefit given to him by the contract. To hold otherwise would be to introduce a novel equitable doctrine that a party was not to be held to his contract unless the Court in a given instance thought it reasonable so to do. In this case it would make an action for a debt a claim for a discretionary remedy. This would introduce an uncertainty into the field of contract which appears to be unsupported by authority . . . .

(d) Section 11(2)(d) sets out guidelines a Court is to have regard to in re-opening a credit contract. These are matters that creditors should have regard to when drawing their credit contracts.

The first guideline reads:

> (1) Whether the finance rate for the contract or any amount payable by the debtor under the contract (whether or not on default by the debtor), is oppressive.

"Oppressive" finance rates and payments are not defined under the Act but no doubt the Court will look to the meaning of oppressive as defined in the Act[14] and criteria used by the Courts under the former legislation.[15] The provision will bring into scrutiny administration fees, guarantee fees and other payments required in terms of some credit contracts.

The second guideline reads:

> (2) Where a debtor is in default under the contract, whether the time given to the debtor by or pursuant to the contract to remedy the default is oppressive having regard to the likelihood of loss to the creditor.

This is of some importance to creditors. To some extent it probably does no more than confirm the law's general approach to a creditor's enforcement of his rights, for example, in the situation of mortgagee sales the Property Law Act 1952 requires certain periods of notice to be given before a mortgagee may exercise a power of sale.[16] Creditors under credit contracts such as debentures will, however, have to act very carefully before appointing a receiver since so often the receiver is appointed at the same time as notice of default is given.[17] A failure by a debenture holder to give adequate notice of default before the appointment of a receiver could have serious repercussions in view of the powers of a Court, having re-opened a credit contract, to set aside a security or to order a receiver to refrain from acting.[18] This could result in a receiver being a trespasser, subject of course to the protection now afforded to receivers in such circumstances by s 345A, Companies Act 1955. Before accepting appointments receivers will doubtless require their legal advisers to confirm that adequate time has been given to a debtor to remedy a default.

The third guideline reads:

> (3) Where the creditor has required, as a condition of early repayment of the credit outstanding under the contract, that the debtor pay interest for a period subsequent to the date of repayment, whether the amount of interest is oppressive having regard to the expenses of the creditor and the likelihood that the amount repaid can be reinvested on similar terms.

This will not provide any difficulty to those creditors who provide a right to repay at any time with interest calculated on a daily basis. It will mean, however, that those charging bonus interest, or "rebated" interest calculated on the "rule of 78" will have to justify

objectively the amount charged. Many creditors often call for three months' bonus interest on repayment. It is submitted that in the prevailing economic climate with a heavy demand for funds this would be oppressive.

Where a debtor has chosen to redeem his mortgage before the expiration of its term a creditor has traditionally been permitted by s 18(2) of the Property Law Act 1952 to charge interest to the debtor for the unexpired portion of the mortgage. This provision of the Credit Contracts Act is an implied repeal of s 81(2) to the extent that now only interest can be charged for the unexpired portion of the term if the amount is not oppressive.

> The fourth guideline reads:
> Where the creditor has refused to release part of any security relating to the contract or has agreed to such a release subject to conditions, whether the refusal is, or the conditions are, oppressive having regard to the amount of the credit and the extent of the security that would remain after the release.

A creditor is often asked to release part of a security held and it is probably fair to say that creditors generally are loathe to comply except on their own terms. This is understandable. However, the provision does oblige a creditor to look a little more closely at such requests in the future. A Court, in applying this guideline, would presumably consider the level of security taken at the time of the loan and whether that security level would be maintained if partial releases were given by the creditor.

Debtors' rights

Section 12 of the Act provides:

> Any party to a credit contract may bring proceedings seeking the re-opening of a credit contract at any time earlier than six months after the date the last obligation to be performed under the relevant credit contract is performed.

These time limits may be expanded in circumstances where the credit provided was used to pay amounts owing under other credit contracts or where amounts owing under the contract were paid from credit provided pursuant to other credit contracts and the creditors under the contracts are either the same persons or related bodies corporate.[19] In these cases re-opening proceedings may be instituted at any time earlier than six months after the date the last obligation to be performed under any of those credit contracts was performed. These provisions could conceivably enable re-opening proceedings to be brought many years after it was intended that the last obligation be performed. It is clear that a debtor who fails to repay a loan on due date obtains a very real benefit from his delay.

Section 13 of the Act provides that where the Court considers re-opening a credit contract, evidence regarding the terms on which credit was available from other persons at the time the contract was made or the exercise of a right or power contained in a contract by other persons at the time the right or power was exercised shall be admissible. This is a welcome section and was included at the suggestion of the Committee because of some uncertainties that existed as to whether evidence of matters of fact bearing upon the question of whether a transaction is harsh and unconscionable (being a question of law) are admissible.

The right of a Court to re-open a credit contract where a creditor intends exercising a right or power contained in the contract does, as far as the creditor is concerned, introduce an element of uncertainty as to the creditor's enforcement rights and a creditor must, quite naturally, be concerned that debtors will use such provisions to unfairly obstruct a creditor in the enforcement of his rights. This exact matter was considered by the Committee:

> We are of the view that the general protection of debtors against harsh terms such as excessive fines is of greater importance than the protection of a financier against the rare occurrence of vexatious and unfounded claims. It may be argued that our proposals will import an element of uncertainty into all credit transactions. We do not think so and point out that the present s 3 (Moneylenders Act 1908) has not had that result in relation to the transactions to which it applies.[20]

Conclusion

It is submitted that the Act will not live up to the terrible consequences that were prophesied. Although there will undoubtedly arise unexpected turns of events as lawyers tackle old situations with renewed vigour, there exists a clear framework of previous case law upon which to draw guidance in today's legal picture.

1 See eg *Earl of Aylesford v Morris* (1873) 8 Ch App 484, 491; *Chesterfield v Janssen* (1750) 2 Ves Ju 125, 155-160; *Benyon v Cook* (1875) LR 10 Ch App 389, 391; See also Pannam *The Law of Moneylending* p 293.
2 S 3(9), Moneylenders Act 1908.
3 The application of s 3 of the Moneylenders Act as recently as 1981 can be seen in *Hughes v Perkins* (High Court Dunedin A26/79) where the Court, while not finding the contract harsh and unconscionable, found the interest charged as being excessive.
4 *Multiservice Bookbinding Ltd v Marden* [1979] 1 Ch 84.
5 [1980] 1 NZLR 386 (see also *M v M* (High Court, Rotorua 26/2/82 A90/79)).
6 (1925) LT 36.
7 Supra 5 at 402.
8 (1956) 99 CLR 362.
9 Supra 4 at 110.
10 Supra 4 at 109.
11 [1906] AC 461. See also Pannam pp 288 et seq.
12 See s 2(2) which states that two bodies corporate are related if:
(a) One of the bodies is a subsidiary of the other; or
(b) There is another body corporate to which each of the bodies is related by virtue of para (a) of this subsection.
"Subsidiary" has the same meaning as in s 158 of the Companies Act 1955.
13 [1962] AC 413 at 445.
14 Which has regard to reasonable standards of commercial practice.
15 The reference to the finance rate being "oppressive" rather than excessive as used in Moneylenders Act may be a move to the British position of requiring that the interest rate be not only excessive but harsh and unconscionable — see *Hughes v Perkins* (supra 3) for a reflection of the New Zealand position under the Moneylenders Act — for the English position see *Multiservice Bookbinding*, where the transaction was examined on the basis of whether it was harsh and unconscionable, not from the basis of whether the interest charged was excessive (in that case approx 33.3 percent pa.
16 Compare also s 348(8) of the Companies Act 1955 which requires a Receiver selling land pursuant to a power contained in a debenture to give notice as required by the Property Law Act.
17 See for example *ANZ Banking Group (New Zealand) Limited v Gibson & Ors* (High Court, Auckland 15/4/81 (A1790/79) Holland J).
18 S 14(1)(e) & (f).
19 Supra 12 for definition of "related bodies corporate".
20 See the report of Committee para 7.10.

Disclosure requirements for mortgage advances under the Credit Contracts Act

I L Haynes, Barrister and Solicitor

General form of disclosure

Separate disclosure memorandum desirable

IT is suggested that the disclosure memorandum should normally comprise a separate document from the mortgage or other loan documents. The initial disclosure requirements as set forth in Part I of the Second Schedule of the Credit Contracts Act are required solely for the purposes of that Act, and at least some of the required information is quite separate from and does not form part of the contractual terms. By way of example it is common knowledge that the finance rate, in all but very straightforward loan transactions differs from the interest rate.

At least some of the information required under cl 5 in relation to amounts, number, frequency and dates of payments may turn out to differ materially from the actual payments which become due (for example where a borrower exercises a right of partial repayment of the principal sum the quantum of interest payments due thereafter will be less than those set forth in the disclosure memorandum). If the amount of interest payments were set forth in the body of the mortgage or loan contract itself, at the very least it could result in contradictory or ambiguous terms. For the above reasons the Auckland District Law Society mortgage form (which is in extensive use throughout the whole of New Zealand) contains a disclosure memorandum which is quite separate from the mortgage itself and is expressly stated not to form part of the terms of the mortgage.

Assumptions should be stated in disclosure memorandum

Where assumptions are made under s 5(2) of the Act in relation to the calculation of the cost of credit (and the resulting finance rate) it is desirable that the assumptions made are expressly stated in the disclosure document. If this is not done, there may in some cases be a risk of breaching the provisions of s 21(1)(c) of the Act which requires the disclosure documents to be in a form not likely to deceive or mislead a reasonable person with regard to any particular that is material to the contract. It should be noted that certain of the assumptions required under s 5(2), and particularly those under s 5(2)(b) may in some instances be quite artificial and result in unusual finance rates. By way of illustration, take a mortgage advance of $10,000 repayable upon demand reserving interest at 15 percent per annum payable monthly in arrears, and with a front end deduction (by way of guarantee fee procuration fee or otherwise) of $500. In these circumstances s 5(2)(b)(ii) directs that the period of the contract shall be deemed to be twelve months, which assumption results in a finance rate of 20.6 percent per annum.

However, if the terms of the above mortgage are amended slightly (for the benefit of the borrower) to provide that no demand for repayment is to be made which would expire prior to three months after the commencement of the term, then s 5(2)(b)(i) applies and directs that the period of credit shall be deemed to be three months, which results in a finance rate of 36.2 percent per annum.

Accordingly, a minor amendment to the loan terms for the benefit of the debtor leads to a marked increase in the finance rate. It is suggested that in each of the above examples, the finance rate is quite artificial and that unless the assumption upon which it is based, is clearly set forth in the disclosure memorandum, it may well be argued that the disclosure is misleading and therefore in breach of the provisions of s 21(1)(c).

Complex disclosure memorandum

If the terms of a mortgage advance are other than very straightforward, a complex disclosure memorandum may result. An example of this is provided by a recent mortgage advance from a Building Society, being an interest-free loan of $4,000 where the total cost of credit was $8 comprising a reserve fund contribution. The disclosure document ran to three pages, and the Building Society required annexed to the disclosure document, the mortgage, a copy of the Society's Rules, together with a copy of the initial loan offer. All the foregoing were considered necessary under the Act purely because the total cost of credit inclusive of interest amounted to $8. As it happened, the finance rate calculated to the nearest quarter percent, was zero.

Complex initial disclosure documents with many annexures are already becoming commonplace. In a recent advance from a Finance Company to a property owning syndicate with approximately 20 members a large cardboard carton was required to house the disclosure documents.

Information required for initial disclosure

Set forth below are matters which require consideration in order to complete an initial disclosure document.

Name and address of creditor

It is considered advisable to insert the full residential address (or perhaps the full business address) of each creditor. It is by no means clear whether creditors may validly stipulate a different address for service of notices on the creditors, although in practice this is being done in some cases. It would however seem very doubtful that debtors would be bound by such a stipulation (see s 22(3)(b)).

Amount of credit

Although it must be disclosed, "amount of credit" is not defined in the Act, and in some cases it is by no means clear what it constitutes. Difficulties arise in the case of front end deductions (eg procuration fees, reserve fund contributions, guarantee fees, etc). It is far from clear whether in such cases the gross or net advance (after deduction of the front end charges) should be shown as the amount of credit. An instance has arisen of a gross advance which just exceeds $250,000, but which after certain front end deductions is somewhat less than $250,000. If the amount of credit relates to the gross loan, the transaction will come within the exemption contained within s 15(1)(f) and will not constitute a

controlled credit contract. However, if the expression means the net loan the transaction is a controlled credit contract and requires disclosure. On any conservative approach it would seem necessary for the lender to treat the advance as a controlled credit contract.

Difficulties arise in the case of a sale of land with settlement due more than two months after the date of the contract, where the sale price exceeds the "cash price" as defined by the Act, and where part of the price is to be satisfied by a mortgage back. In such a case there are in fact two distinct credit contracts, namely the agreement for sale and purchase itself, and the mortgage back which by virtue of s 4(2) of the Act constitutes a separate credit contract. Separate initial disclosure must be made for each of the contracts which will have different amounts of credit.

Total cost of credit

The amounts and descriptions of the various components comprising the total cost of credit must be shown, and in the case of a loan which does not come within the ambit of para (a) the total interest must be shown, in each case in dollar amounts.

Difficulties arise where there is security collateral with a mortgage over real property. There may be some argument that in such cases the credit contract comes within para (b) requiring interest to be shown as a separate item, and certainly the advisers for many lenders are considering it prudent to show interest as a separate item. Accordingly in the case of a mortgage advance, with collateral security, reserving interest at a given rate with monthly rests and with monthly table instalments amortising to a nil balance over a twenty year term it is necessary to calculate and disclose the total interest payable over the full twenty year period. Certainly this is the position in the case of a chattels security or debenture.

Finance rate

In other than straightforward loans (that is loans with no front end loading and where interest adjustment dates correspond with payment dates) the calculation of the finance rate will require either a complex business calculator, or the services of an actuary. In the latter case the actuary's fee would normally constitute part of the cost of credit and must be disclosed and taken into account in calculating the finance rate itself.

In many cases the finance rate will constitute a complex decimal (eg 19.3481 percent). Section 6(1)(a) permits the finance rate to be rounded to the nearest 1/4 percent which in the above example would be 19.25 percent. The section does not expressly permit more accurate rounding (eg to 19.3 percent or 19.35 percent) and in these circumstances it may be considered desirable in every case to round to the nearest 1/4 percent, as the Act expressly authorises.

Payments required

Very specific information must be disclosed, namely the amount of each payment, the number and frequency of payments, and the dates when payments are to be made. This means that in some cases it is in effect necessary at the outset to calculate the whole mortgage account from inception to termination and sometimes a very lengthy table will require to be shown. In the case of a loan of $30,000 with monthly principle reductions of $100 each calculated with monthly rests, and with separate monthly instalments of interest, with the balance falling due in ten years 120 separate interest calculations must be made at the outset and these amounts set forth in a table. In addition reference must be made to 119 principal reductions of $100 each, together with a final principal repayment of $18,100 at the expiration of ten years. One may question whether such detailed information is really necessary for the proper protection of the borrower.

Other terms of contract

It is suggested that this may prove to be the most troublesome requirement of all from the viewpoint of the lender, who is required to disclose all terms of the contract not referred to under the previous five headings, other than terms implied by law. This requirement has a number of ramifications some of which are set forth below:

It has been a common practice to use a shorthand expression, ascribing to that expression the meaning given thereto in some statute (eg to provide that the principal sum is repayable "Upon Demand" with the expression "Upon Demand" bearing the same meaning as that ascribed to it in the Fifth Schedule to the Chattels Transfer Act 1924. The use of an expression adapting the statutory definition is not a term implied by law and accordingly it will now be necessary to set out in full the meaning which is to be given to the expression "Upon Demand". The very useful shorthand covenants in the Fourth Schedule to the Land Transfer Act 1952 can no longer be employed and will require setting out in full either in the security document itself or in the disclosure memorandum. In the context of lending, this completely negates the usefulness of the shorthand expressions, which had been given statutory recognition, but nonetheless do not fall within the expression "terms implied by law".

If there has been a prior loan offer or prior correspondence relating to the advance, it would seem prudent to attach such loan offer or correspondence to the disclosure document, unless it is clear that such loan offer or correspondence has been totally superseded by the security documents themselves. Care is necessary to ensure that terms in a written loan offer have not subsequently been waived or varied (either orally or in writing) as any such variation would clearly require disclosure.

There can sometimes be certain understandings between borrower and lender, and great care must be given to determining whether any such understandings have crossed the threshold and become terms of the contract, thereby requiring disclosure. An example is that of a large company which frequently makes loans to its staff at a current interest rate of 15 percent with quarterly rests. In practice, there is a very complex understanding in existence whereby based on a staff member's performance and other considerations the company accepts interest at lower rates than that reserved by the mortgage, and/or calculates interest with monthly rests. The arrangements are too complex to reduce readily to precise legal terms, and in any event are from time to time varied, and also involve an element of discretion by the lender. The company has been advised to notify staff receiving post Credit Contract Act loans that such arrangements will now not apply or alternatively will be entirely at the discretion of the company as they cannot satisfactorily be reduced to writing and form part of the disclosure. A lender's solicitor may in some cases need to make careful inquiries of the lender to ensure there are no arrangements or terms between the

parties which require disclosure. If there is any doubt as to whether some "understanding" constitutes a term it may be desirable either to expressly include or exclude such an understanding from the terms of the contract.

It may be necessary to give consideration to disclosing what may seem obvious terms (eg that a mortgage of land is to be registered, or that the mortgagee requires a memorandum of priority to be executed and registered according his mortgage priority over an existing charge.

All collateral contracts and linked transactions must be included in the disclosure (see s 4).

The expression "all terms of the contract" used in cl 6 are almost identical with the words "all the terms of the contract" used in s 8(2) of the Moneylenders Amendment Act 1933, so that decisions of the Courts in relation to the latter subsection would clearly seem applicable in interpreting cl 6. It is clear that there is non-compliance with this clause if any term of the contract is omitted from the disclosure, including an agreement to apply the whole or part of the moneys advanced to repay an earlier loan (*Adams v Paul's Properties Ltd* [1965] NZLR 161). Various Court decisions under the Moneylenders Act may have disturbing consequences when applied to cl 6.

Section 4(2) of the Credit Contracts Act provides that where a term of a contract of sale of real property provides for a mortgage back to be entered into, the mortgage together with the relevant term in the agreement are deemed to be a separate credit contract made at the time when the mortgage is entered into. Since the relevant term in the agreement for sale and purchase constitutes a term of the severed credit contract, it is suggested that such term should be included in the disclosure memorandum which accompanies the mortgage, unless the terms of the mortgage entirely embody or supersede the relevant provisions in the agreement.

It is suggested that the requirement that the creditor disclose all the other terms of the contract is far too onerous, and it is noted that the Law Reform Committee in para 8.04 of its report considered that it would be quite unsatisfactory to require all the terms of the contract to be disclosed. It is submitted that the disclosure requirements set forth in cls 1 to 5 of Part I of the Second Schedule, coupled with a debtor's rights under Part I of the Act dealing with the re-opening of oppressive credit contracts, together afford ample and sufficient protection to a debtor.

Service and records

It is considered most desirable that individual legal offices establish clear-cut procedures in relation to the service and recording of service of disclosure documents. In each case permanent proof of disclosure is essential. It must be kept in mind that (particularly in the case of loans for lengthy periods) the persons involved in the initial disclosure process may not be available to give evidence (or indeed be able to recall the precise circumstances involved) if initial disclosure is at a later date called into question by a borrower. With this in mind the following are tending to become standard procedures in many legal offices:

Personal service is effected by handing copies of the disclosure document with appropriate attachments to all debtors and guarantors with receipts being obtained from each such party. Service is effected on all guarantors as they are very often by virtue of the relevant provision in the mortgage deemed to be principal debtors as against the creditor. The receipted copy of the disclosure document and attachments is then held with the registered securities in order to provide permanent proof of initial disclosure.

If postal service is effected then the debtors are advised that the advance will not be finalised until receipted copies of the disclosure documents are received from all of the debtors.

Service on companies creates special difficulties. Section 20(1) requires disclosure to be effected by giving or sending by post to the last place of business or residence known to the creditor. As it seems open to doubt whether disclosure documents can be "given" to a company, the practice arising is either to deliver or post the disclosure documents to the registered office of the company, requiring (before the loan is advanced) an acknowledgment from an officer of the company that the disclosure documents were received at the registered office of the company on a given date.

Disclosure by service on a duly appointed attorney of a debtor would seem highly questionable (having regard to s 20(1)) and most legal advisers are not prepared to adopt such a procedure. Accordingly, if any of the debtors is overseas or otherwise unavailable, it is likely that completion of the loan transaction will be delayed until the debtor becomes available. Many legal offices are imposing as a standard requirement; the personal attendance of all borrowers and guarantors at the legal office in order to execute the security documents and accept service of the disclosure documents. The certificates required by various lending institutions require the solicitor to certify that the disclosure documents were handed to all borrowers and guarantors.

It is necessary to set up procedures to ensure that request disclosure is promptly complied with and suitable records kept in order to provide permanent proof of compliance with request disclosure. Procedures along the lines set forth above require careful organisation (particularly in larger legal offices) with all staff who are likely to be involved receiving detailed and explicit instructions in relation to such procedures.

Specialised loans

Loans involving specialised circumstances or terms require careful consideration in order to ensure in each case due compliance with the provisions of the Act. A few illustrations of such specialised situations are as follows:

(1) *A loan being made available by progress payments.* Apart from other considerations by virtue of the wide definition of "revolving credit contract" in s 2(1) of the Act such a loan may in many circumstances constitute a revolving credit contract.

(2) *A mortgage securing further advances.* Careful consideration must be given to the nature of the further advances which are envisaged, and it is likely that in many cases such a loan will comprise a revolving credit contract.

(3) *The variation of pre-Credit Contract Act mortgages.* It is considered that in many cases the best procedure is to effect repayment of the previous advance, with the moneys being re-advanced by way of a totally new credit contract which complies with the Act.

(4) *Pre-Credit Contract Act mortgages securing further advances.* In many cases these will now constitute revolving credit contracts requiring continuing disclosure. Consideration may be given to modifying the terms of such mortgages in an endeavour to remove them from the field of revolving credit contracts.

Conclusion

If a mistake is made in regard to any aspect of initial disclosure it is likely to result in the disclosure being invalid and ineffective, with the drastic consequences set forth in ss 24 and 25 of the Act applying unless relief can be obtained under ss 31 or 32. One may reasonably expect that in many cases initial disclosure documents will be subjected to the closest scrutiny by those advising defaulting debtors, and accordingly the highest standard of care is required of solicitors involved in the preparation and completion of such disclosure documents.

Forensic Fable

Greatest hits from the [1928] NZLJ

The old stager and the exchequer suit on the information of the Attorney-General issuing out of the Petty-Bag

ONE day an agitated Solicitor Waited upon an Old Stager. The Latter was Replete with such Learning as is to be found in the Third Edition of "Bullen & Leake." The Agitated Solicitor Wanted the Old Stager to Advise him. There was a Firm of High Standing which Owed his Clients a Lot of Money. Though the Firm of High Standing had not a Leg to Stand upon, Order Fourteen was No Good, as they could Easily Put Up some Rotten Sort of Defence. His Clients must Have the Money forthwith as they were in a Wobbly Financial Condition. What was he to Do?

The Old Stager said it was Clearly a Case for an Exchequer Suit on the Information of the Attorney-General Issuing out of the Petty-Bag. He Promised to Prepare without Delay the Necessary Formal Documents. When the Agitated Solicitor had Withdrawn the Old Stager got to Work on the Draft. It Began with the Observation, "Oyez, Oyez, Oyez," and Recited that the Right Honourable the Attorney-General had been Informed by his Trusty and Well-beloved Thomas Binks and Thomas Binks the Younger (Trading as Binks and Company) that the Firm of High Standing Owed them the Sum of £3,921 4s 8d. It Proceeded to Warn the Firm of High Standing that by Declining to Pay the said Moneys they had Rendered themselves Liable to the Pains and Penalties Made and Provided by 1 & 2 Ric II, c 4, 18 Eliz c 25 and Divers Acts Amending the Same, the Provisions whereof were reserved and Maintained by and Incorporated in the Judicature Acts of 1873 and 1875 (36 & 37 Vict c 66 and 38 and 39 Vict c 77). It then Summoned Each and Every of the Members of the Firm of High Standing to Attend at Twelve O'Clock (Midday) on Monday (*die Lunae*) next after the Morrow of All Souls at the Bar of the House of Lords and there Show Cause in Person why they should not be Committed to the Clock-Tower of his Majesty's Palace of Westminster or to his Majesty's Keep or Tower of London and there be Imprisoned until Further Order. In a few Closing Sentences it Pointed out that if they Desired to be Assoilzied, Purged and Acquitted of the said Debt and Relieved from the Obligation of Attending at the said Bar of the said House of Lords, the Firm of High Standing must Cause the said Sum of £3,921 4s 8d to be Paid in Cash to the said Thomas Binks and Thomas Binks the Younger (trading as Binks & Company) within Twenty-four Hours. At the end the Old Stager added the Devout Aspiration, "God Save the King." He also Penned in the Margin a Note to the Effect that this Imposing Document should be Engrossed on Parchment and Served upon the Defendants by a Mounted Policeman. The Firm of High Standing (who were Hoping for a Government Contract in the Near Future) were so Terrified by the Old Stager's Screed that, without Consulting Their Solicitors they Cashed up at once. When the Agitated Solicitor Subsequently Enquired of the Old Stager where he had Unearthed this Most Satisfactory Procedure, the Old Stager Modestly Confessed that he had Invented it.

Moral: Try it on.