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The Year of the Judge

PREDICTING the future and scrutinising the past (while ironically forgetting the present) is something that occupies our attentions, either as a diversion, pastime, or obsession. Not that we are ever right. Techniques may change, but the great unknown quantum of tomorrow remains the same and humbles statistician and soothsayer alike. A famous news photo of a beaming and victorious Harry Truman brandishing the *Chicago Daily Tribune* — which in banner headlines prematurely declared Dewey the winner of the 1948 US Presidential election — is testimony to the awesome powers of the future acting in defiance of the will of Man. The past can be as difficult. For example, we know there was a Dark Ages; however calculations as to its length can differ by as much as 500 years. With this in mind, the editor leaps without a parachute into the void of the fourth dimension and solemnly declares 1982 as the "Year of the Judge".

A cursory glance at the entry headings — "Judges and Royal Commissions", "Judges in the dock", and "the Courts under attack", to mention a few — provide proof that the judiciary featured prominently in the *Law Journal* this year. A brief examination shows why:

In February, the editorial was devoted to the premature loss to the Bench of Mahon J. As a result of serving on a Royal Commission, the highly-respected Judge found himself in the epicentre of a political storm and resigned as a consequence.

The next month's editorial, "Penal policy and sentencing", concerned itself with the functions of a Judge in a world of specialists. The editorial was in response to the *Report of the Penal Policy Commission* — chaired by a High Court Judge — which examined, inter alia, the possibility of the Bench relying upon an outside body for guidance in sentencing.

July's *Law Journal* paid tribute to that most redoubtable of Judges, Lord Denning, who was compelled to resign over remarks he made in his latest book, *What Next in the Law*. The controversy failed to blemish his remarkable career, however, and his accomplishments were duly chronicled.

In August the editorial paid attention to the Privy Council. This followed from two of its recent decisions which revived old arguments concerning its role as New Zealand's highest appellate tribunal.

In an article in October, the subject of February's editorial, the Hon P T Mahon QC, criticised the Government for breaching convention in taking public issue with some of the recent decisions of the Courts. The decisions all had political implications, attracted wide publicity, and involved the Government as a litigant — the tour, the Clyde Dam, and citizenship for Samoans.

The November issue contained two book reviews, the first concerning the latest opus of Lord Denning and the second a behind-the-scenes account of the US Supreme Court. Denning's book, his fourth in as many years, served as a reliable vehicle for his self-appointed role as Judge-cum-social commentator. The other book, written by two journalists, scrutinised the activities of people seen to be in positions of great power.

Finally, this month's lead article is devoted to a commentary on the reasoning processes of Their Lordships in delivering judgments in the House of Lords. The article is a response to a study appearing late last year in the *Modern Law Review*. That study was highly critical of Their Lordships and was noted in July's *Law Journal*. The present article challenges the study in its methods and findings.

Are there any conclusions one can draw? Although it may be tempting to ascribe a trend to random events, one must be content in this case with a mere name, one that reminds us once again of the prominence of the judiciary in both our profession and our society. In 1982 these reminders appeared constantly, in this publication and elsewhere. In due course, those who gave us Dewey's election and brought clarity to the Dark Ages will apply their skills to the matter at hand and produce definitive answers. In the meantime, it is appropriate simply to acknowledge what has occurred and to reflect upon 1982 as the "Year of the Judge".

John McManamy

Case and Comment

The drivers case — Ruling the economy out of Court

(The following article first appeared in National Business Review (1 Nov) and is reprinted here with the kind permission of the author).

A few cynics, with time on their hands to wade through 60-odd pages of judicial prose, might suggest that the recent majority decision of the Court of Appeal on the drivers' union challenge to the Wage Freeze Regulations owes a little to the bad old days when the Courts got on with union bashing and let the Government get on with governing (and didn't provoke the Government into Court bashing).

To put that decision in perspective requires mention of the really bad old days of 1942. By all accounts, that was a gloomy year and was the excuse for "economic stabilisation" provisions to be made as part of the War Emergency Regulations.

And 1948 was not a great year either. It was then that the wartime regulations were promoted into the statute book in the form of the Economic Stabilisation Act. The Minister in charge of the Bill, a youthful Arnold Nordmeyer, justified the legislation as essential to keep prices, costs and wages from rapidly inflating.

The National Opposition was highly critical of the Bill and of the wide and even "arbitrary" powers given to the Minister. (But 30-odd-years of subsequent National governments have seen the Act — and the arbitrary powers — remain on the books.)

But the Economic Stabilisation Act is commendably concise. It gives the Governor-General (a constitutional euphemism for the Cabinet) power to make all such regulations as he (it) thinks are necessary or expedient to promote the economic stability of New Zealand.

"Economic stability" is not defined but the New Zealand Courts, perhaps unconsciously borrowing from the American jurisprudence on obscenity, have reckoned that they know it when they see it.

Which brings us to the Wage Freeze Regulations and the drivers' unions.

In June this year the Arbitration Court appointed a conciliator to preside over a conciliation council (comprising the conciliator plus assessors nominated by each side) which would thrash out a new award to settle the "dispute of interest" created by the drivers asking for a 30 percent increase in remuneration and the carriers refusing it. Dates in August were set down for the conciliation hearing.

A week or so later the Government wheeled out the Economic Stabilisation Act and cranked out a series of regulations purporting to "freeze" prices, wages, rents, dividends and the like for 12 months.

Under the Wage Freeze Regulations the fixing of rates of remuneration higher than those already lawfully payable was prohibited. It did not matter whether the rates being fixed were to take effect during or after the freeze period — they were caught by reg 5.

And reg 8 made it an offence to do anything with intent to defeat the regulations.

The drivers failed to take the hint and very publicly proceeded with their claim, but the carriers bailed out by refusing to nominate assessors. This stymied the conciliator, who referred the matter back to the Arbitration Court in August.

Before that Court could hear anything the Economic Stabilisation Act was again used to amend the Wage Freeze Regulations.

The primary amendment was the insertion of a new reg 5A which flatly prohibited various bodies, most notably the Arbitration Court, from determining, or even continuing to hear, disputes of interest. The Arbitration Court wasted no time in referring the question of what it should do with the drivers' claim to the Court of Appeal.

The Court of Appeal itself wasted little time in hearing the case and delivering the decision (*New Zealand Road Transport etc IUW v New Zealand Road Carriers Union of Employers and Others* (Court of Appeal. 22 October 1982 (CA 130/82)). The (5-member) Court split 3-2 on the major issue and the result was that the Wage Freeze Regulations, as amended, were held to be valid.

In the end, the point in issue was the validity of reg 5A. The drivers' counsel conceded — and all the judges accepted — that the "ordinary" freeze (ie, reg 5) was within the scope of the 1948 Act.

The Court was also unanimous that the drivers' case had not progressed far enough before the freeze for them to take advantage of the savings provisions in the regulations.

The general approach of the Court of Appeal to regulations made pursuant to the Economic Stabilisation Act was restated last year in a case in which the carless days regulations were unsuccessfully challenged: "The Court has to ask . . . whether the regulations are capable of being regarded as necessary or expedient for the general purpose of the Act. A tenuous or remote connection with economic stability would not be enough; it would invite an inference that the regulations had not really been made for the purpose authorised by Parliament."

The majority of the Court, Justices Cooke, McMullin and Ongley, adopted what might be described as a "macro" approach to the case.

Their judgment noted that the wage freeze was part of a wider economic restraint package and that virtually all matters covered in awards (not just wages) are linked with economic stability (in that they may add to employers' costs and — so much for competition — prices).

It had earlier noted that the general freeze would be undermined by any sudden increases in wages and prices following the freeze and it went on to note that there could be little confidence that vested interests would not seek to avoid the effect of the

freeze.

Given that the 1948 Act entitled the regulation makers to impose a freeze and that the Arbitration Court's jurisdiction over wage fixing was central to wage levels in this country, the majority held that the regulation makers were entitled to seek an effective freeze even if this meant (as reg 5A did) suspending the operation of that wage-fixing jurisdiction.

The approach of the minority, the president, Sir Owen Woodhouse, and Mr Justice Richardson, might be described as "micro". They looked at the Wage Freeze Regulations standing alone and concluded that reg 5 together with reg 8 created an effective wage freeze.

As reg 5A, in their view, achieved nothing further in terms of economic stability it could not itself be related to economic stability and fell outside the scope of the 1948 Act.

In concluding that reg 5A added nothing to reg 5, the minority considered that the non-remuneration matters arising in awards were of no significance and that as awards must last for a minimum of one year there was no scope for a "log jam" immediately the freeze expired.

Further, said the minority, reg 5A could be counter-productive: denying access to the arbitration system could well injure industrial relations generally and in turn affect economic stability.

Each of the judgments has an eyebrow-raising feature. The majority, in an almost throwaway line, observe that they doubt that even an Act of Parliament could remove the right of citizens to resort to the ordinary Courts for determination of rights.

Given that Parliament is unquestionably sovereign and that many Acts (for example, the Accident Compensation Act) have denied access to the Courts, it is difficult to know what this means.

The minority advance the theory whereby a regulation that is superfluous (because other regulations cover the same ground) is to be taken as outside the scope of the Act. This denies the possibility of a regulatory "backstop" and does not resolve the problem of which regulation must fall if the overlapping regulations are, unlike regs 5 and 5A, made contemporaneously.

But these are relatively minor points. The major issue, addressed in neither judgment, is whether it is appropriate that regulations made by Cabinet should be able to effectively override both Acts of Parliament and rights implicitly recognised in such Acts.

In the carless days case, the Courts unimaginatively held that there is no recognised right in this country to drive a motor vehicle.

The latest case tells us that there is no right to take dispute of interest into the conciliation and arbitration system.

With those kinds of results, the comment in the carless days case — "It is not to be supposed that by the 1948 Act the New Zealand Parliament meant to abandon the entire field of the economy to the Executive" — deserves a moment's thought and a hollow laugh.

Jack Hodder

Criminal law — involuntariness

A recent decision of Hardie Boys J, has revived the notion of absence of "voluntariness" as a defence to strict liability offences. This idea was earlier articulated in the controversial decision of *Kilbride v Lake* [1962] NZLR 590, which was expressly approved in the instant case: *Lind v J G Laurenson & Son Ltd* (High Court, Dunedin. 12 February 1982 (M 146/81) Hardie Boys J).

The respondent company was charged under s 23(2) of the Road User Charges Act 1977 with operating a truck and trailer without a distance recorder in good working condition. The evidence indicated that the "hubodometer" had been seriously defective for a period of one month. The vehicle was only used once a week, but during this period had travelled about 1,000 km.

At first instance the District Court Judge dismissed the information against the respondent upon the grounds first, that mens rea was a necessary element of the offence or alternatively, "that there was no voluntary act or omission on the part of the respondent in relation to the physical ingredient of the offence".

Hardie Boys J, reversed the decision of the District Court on both points. First, His Honour held that, having regard to the statutory context, the provision imposed "absolute liability". Second, Hardie Boys J distinguished the decision of Woodhouse J, in *Kilbride v Lake*. His Honour found that ". . . as a matter of causation there is in my view the necessary link back from the defective state of the device to a voluntary omission on the part of the respondent. For the respondent could have taken the choice of checking the device prior to the commencement of the journey. Its failure to do that was voluntary."

His Honour's first conclusion (that the provision imposed absolute liability) is open to criticism. With respect His Honour's choice of terminology overlooks a distinction that must be drawn between offences of "absolute" and of "strict" liability. The latter represents an intermediate stage between full mens rea and absolute liability offences. It is a defence to a "strict" liability offence that the defendant was not responsible for producing the actus reus, (ie in the sense that he did not act "voluntarily", or in some other sense).

No such defence exists to an "absolute" liability offence. Such offences are comparatively rare. Their distinctive feature is that the actus reus is, as a matter of statutory interpretation, *independent* of any act or omission by the defendant. A case in point is *Helleman v Collector of Customs* [1966] NZLR 705. There the provisions read:

> . . . if any ship comes or is found within one league of the coast of New Zealand . . . [having fitted any smuggling devices] . . . the master and owner shall be . . . liable . . . .
> (See also *Police v Taylor* [1965] NZLR 503.)

Contrast, however, the form of the indictment in the infamous case of *R v Larsonneur* (1933) 24 Cr App R 74: ". . . being an alien to whom leave to land in the United Kingdom has been refused was found in the United Kingdom". It is submitted that this was not an absolute liability offence inasmuch as the indictment was expressed in terms of the defendant herself rather than some object to which she might be linked (cf *Helleman*). Thus absence of voluntariness could have been pleaded.

That "voluntariness" is, except in cases of absolute liability, an essential constituent of the actus reus may be considered settled in New Zealand. Less certain are the parameters of this concept. Automatism is an exculpation clearly within the aegis of "involuntariness". However the expression "(in) voluntariness" is apt to

mislead. It tends to suggest only situations where the actor has been directly robbed of his will. Yet the principle has a wider application. It extends to external factors directly or indirectly robbing the defendant of control over the events producing the harm complained of: *Burns v Bidder* [1967] 2 QB 227 (esp James J at 240-241). A further difficulty with involuntariness is determining an acceptable conceptual basis upon which the principle may be founded.

The following general propositions may be advanced in respect of strict liability offences (and, of course, mens rea offences). The actus reus may consist of several constituent acts or omissions. The defendant must be linked in a casual sense, to each. If some unforeseeable or unavoidable event robs him of the opportunity to secure compliance with his legal obligations, he cannot be held responsible. This is more than mere "involuntariness", (in the sense of absence of will). It comprehends other hazier defences such as "impossibility", (eg *Burns v Bidder, Tifaga v Department of Labour* [1980] 2 NZLR 235), "accident", "total absence of fault" (*Police v Creedon* [1976] 1 NZLR 571, *MOT v Burnetts Motors Ltd* [1980] 1 NZLR 51, *R v City of Sault Ste Marie* (1975) 85 DLR (3d) 161), "act of God" and "act of a stranger" (*Alphacell Ltd v Woodward* [1972] AC 824 *Strowger v John* [1974] RTR 124). This rationale could also encompass the defences "duress" and "necessity" in instances of conscious acts or omissions over which the defendant had no control.

The "hubodometer" had been faulty for about one month. It could have been said (although Hardie Boys J did not explicitly say so) that the company had a continuing obligation to check the device. In any event, in failing to check the device before proceeding on the ultimate trip the respondents were the authors of their own misfortune. Non-compliance arose as a result of their own fault. They had had an adequate opportunity to inspect the device and discover its defect. The defective hubodometer had become the responsibility of the defendant. As Hardie Boys J noted, the situation would have been altogether different had they checked the device before setting off and it had become defective subsequently.

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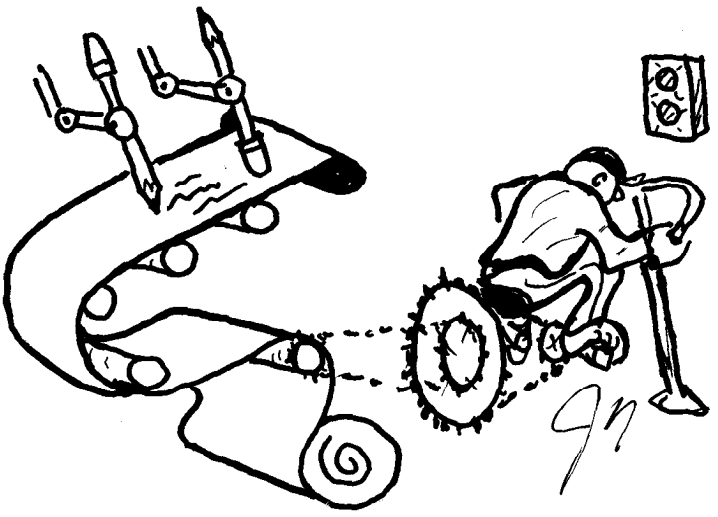
Law Reform



Community mediation

RARE indeed is the lawyer, Judge, Court clerk, police officer or member of Parliament who has not at some time experienced the frustration of grappling with family feuds, or with neighbours who, after months of trading insults and rubbish over the fence, finally confront each other with physical violence or damage to property.

Commonly, police and local authorities receive repeated calls from alternately one then the other of two warring neighbours engaged in a saga or harassing and retaliatory acts. Lawyers struggle with the web of accusations and counter accusations by siblings haggling over family property; with tales of real and imagined wrongs by cohabitees at the bitter end of their relationship. The Court finds before it the same parties with whom it dealt only a few months before, each time with only a slight variation of the same problem.

In general, disputes between neighbours, work associates and members of the same household may (at least initially) be minor in the eyes of the law. But they can come to dominate the lives of the people caught up in them. At times, what began as petty hostilities culminate in serious injury or death. Readers may recall the 1980 case of the Greymouth man charged with the murder of his neighbour after a long-running boundary dispute between the pair. The accused told the policeman who arrested him: "The whole thing between us got out of all proportion."

Consideration of the cases which tend to recur and escalate suggests that they share an important characteristic. In all of them, whether civil or criminal, the individuals concerned have some form of ongoing contact or relationship with each other. When they leave the Court or police station they will either "get along" or continue in conflict as long as their relationship continues.

Yet, any Court decision will necessarily be made without regard to their troubled interpersonal relationship which may be the source of future disagreements and further litigation. The adjudicatory framework focuses on isolated incidents. The Court must give a judgment with respect to the particular claim or charge before it. Rules of evidence deliberately exclude any concerns not directly relevant to the subject of the hearing — even if those concerns are the "real issue" for the disputants.

Adjudication is concerned with questions of right and wrong, of guilt and innocence, of winner and loser. This zero sum approach has served us well in cases in which the dispute is the only relationship the parties have. However, where there is some form of continuing contact, a short-term outcome in which only one can "win" with respect to a specific incident may serve to inflame further the hostility of the other.

In such situations, the Courts do not fulfil one of their avowed objectives: to put an end to litigation. A recent Christchurch survey by the writer of people working in the justice system, local authorities and community agencies indicates a widely-held view that the attempt to

apply legal rules of "right" and "wrong" to these cases is counterproductive and costly, both in terms of wasted resources and of the frustration experienced by disputants and service providers.

Is there another way?

If the particular incident which comes to the attention of the lawyer or police officer is merely a symptom of underlying conflict, our need would seem to be for a technique which probes the causes of the conflict rather than focusing on isolated acts which may be the subject of legal proceedings. This is what mediation seeks to do.

Mediation involves disputants voluntarily coming together in a neutral place with an impartial third party who assists them to reach a *mutually* acceptable resolution of their differences. In contrast to adjudication, the objective of mediation is that both parties should emerge from the process as "winners".

The mediator's primary task is to facilitate direct communication between the disputants. At the outset, each is asked to articulate his or her perceptions of their conflict. A heated discussion usually follows at this point. The mediator consistently encourages each party to direct his or her statements to the other party rather than to the mediator, and seeks to ensure that the "message is received" and responded to by the other.

No issue is trivial or irrelevant if seen as important by one of the parties. At the same time, the mediator seeks to act as an "agent of reality": by a process of questioning, identifying and clarifying significant issues in dispute, and ensuring that each party learns how his behaviour and actions have been interpreted and reacted to by the other, the mediator works to build up a framework for common perceptions between them, and ultimately, for some sense of shared responsibility. Within this framework, the mediator urges the parties to suggest ways of pursuing their goals compatibly in the future. The mediator does *not* make such suggestions him/herself: they must come from the parties. Any resolution will be one they themselves have developed as a workable formula for coexistence, although it is a function of the mediator to question elements of an agreement which might appear impracticable.

The mediator has no power to compel a settlement, but appeals to the disputants' self-interests. Similarly, if the agreement is to last, the parties must see it as being in their own interests to make it work.

Mediation is now a familiar dispute resolution technique in the context of family (s 13 of the Family Proceedings Act 1980) and industrial law, but its potential in relation to the wider category of cases referred to in this note has not yet been tapped in New Zealand. In late 1980, the Department of Justice published a discussion paper outlining the principal features of several Neighbourhood Justice programmes in the United States. Many of these programmes have achieved promising results in mediating cases which seem unresponsive to police or Court intervention. An Australian pilot project of three Community Justice Centres was recently extended and established on a permanent basis following a favourable evaluation of its first year's operation (NSW Law Foundation Pilot Project, 1982).

In Christchurch, moves are currently under way to establish a community mediation service using trained volunteers as mediators. A broadly-based organising committee, convened to oversee the development of the service, enjoys the participation of, amongst others, the Registrar of the District Court, a member of the Canterbury District Law Society, the police, the Citizens' Advice Bureau, the District Council of Social Services, and the Multicultural Committee of the City Council.

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Law practitioners

THE Law Practitioners Bill recently saw its second reading and will probably emerge in Act form by the time this piece goes to press. Essentially, there was little in the second reading that adds to what was said when the Bill was introduced (see the August issue of the *NZLJ* at p 279). The President of the New Zealand Law Society, Mr Bruce Slane, speaking in Wellington on 7 October, observed that the Bill has occupied a great deal of the Society's time over the last five or six years and believes that it is a "brand new, effective and efficient piece of legislation which is designed for the 1980s and beyond". The most substantial changes occur in the area of discipline and Mr Slane elaborated in an article in the September edition of the *New Zealand Valuer* at p 123:

> There will be a lay observer or lay observers for New Zealand who will be available to anybody who has complained about a lawyer and is not satisfied as to what the District Law Society is doing about it. There will be also, at the Disciplinary Tribunal, two lay members. . . .
>
> . . . .
>
> The second part of maintaining competence is to use the disciplinary procedures to help people. What we have done is to make available a wide range of options to the Disciplinary Tribunals if a practitioner is charged before a Tribunal. He can be struck off, can be suspended, can be ordered at present not to work on his own account or that he must work with somebody else. We are going beyond those now and we have got a whole range of other choices which are available to the Tribunal.
>
> For instance, the Committee will be able to order a practitioner to complete work at a certain fee for a client. He can be required to report to someone regularly on his practice. He can be required to take advice on management from someone and to make his practice available for inspection. He can be required to not hold himself out as competent in a particular field and not to undertake that kind of work. . . . All these new orders can be made by the Disciplinary Tribunal even if they find there has been no professional misconduct but simply that there was justification in bringing a charge.

Another point of view concerning the Bill was presented by the editor of *Capital Letter*, Mr Jack Hodder. In a recent editorial Hodder noted that the Bill had been considered with care by the Statutes Revision Committee and by the whole House but it nevertheless "remains an unimaginative piece of law". Hodder sees the regulation of the organised legal profession as a matter secondary to that of the provision of legal services. He repeats the arguments advanced by Davies and Ludbrook in [1978] *NZLJ* 457 that barriers to new entrants to the profession contribute to the existence

of unmet legal needs. Further, "other matters of public interest that the Bill either ignores or delegates to the NZ Law Society are those of ethnic under representation in the profession, advertising of the availability and price of legal services, minimum scale charges, the role and training of para-legals and the overhaul of legal aid".

Those are two views on the matter. It may be, however, that both will be superseded by events. Ruth Richardson MP during the second reading observed that Parliament's brief is a continuing one. As one example, she mentioned that two committees are looking into the conveyancing practice, one in relation to land transfer legislation and the other in relation to commerce legislation. Further, there is a Justice Department working party investigating legal aid and the provision of legal services and their recommendations may result in new legislation.

Land transfer and technology

"WITHIN ten — or at the most twenty — years a very great proportion of Australia's land title and related data will be on computer. The tedious, time-consuming attendances, scrutiny and correspondence which are at present recited to justify the significant professional costs may, to a very large extent at least, be reduced to the non-professional tapping of a few keyboards and the automatic printout of aggregate data that facilitates, expedites and cheapens the process of land conveyancing. This is not a dream world. It is not science fiction. Torrens, as he contemplated the dream of the future city Adelaide, could well have had the glint of a computer in his eye. The grid procedure lends itself to computerisation, by its central registry, its system of registered transfer and its guaranteed title, open to public inspection."

Kirby J, Chairman of the Australian Law Reform Commission, from a 17 April 1982 address.

Inter Alia

Advocacy — the grand old style

SOME say we have passed the golden age of advocacy. Certainly, they do not make speeches like they used to. The *People's Almanac* by Wallechinsky & Wallace (Doubleday & Company Inc, 1975) serves up the classic (and true) case of the distressed litigant whose prized dog had been killed. In a packed Missouri Courtroom, George Graham Vest (later to be a US Senator) threw aside the niceties of legalisms and evidence and made his appeal to the jury:

> Gentlemen of the jury, the best friend a man has in this world may turn against him and become his enemy. His son or daughter whom he has reared with loving care may prove ungrateful. Those who are nearest and dearest to us — those whom we trust with our happiness and good name — may become traitors in their faith. The money that a man has he may lose. . . . The one absolute, unselfish friend that man can have in this selfish world — the one that never proves ungrateful or treacherous — is his dog.
>
> Gentlemen of the jury, a man's dog stands by him in prosperity and poverty, in health and in sickness. He will sleep on the cold ground, where the wintery winds blow, and the snow drives fiercely, if only he can be near his master's side. He will kiss the hand that no food has to offer; he will lick the wounds and sores that come in encounter with the roughness of the world. He guards the sleep of his pauper master as if he were a prince. When all other friends desert, he remains. When riches take wings and reputation falls to pieces, he is as constant in his love as the sun in its journey through the heavens.
>
> . . .

How effective was Vest? According to opposing counsel:

> Court, jury, lawyers, and audience were entranced. I looked at the jury and saw all were in tears. The foreman wept like one who had just lost his dearest friend. The victory for the other side was complete. I said to Cockrell that we were defeated; that the dog, though dead, had won, and that we had better get out of the Courthouse with our client or we would be hanged.

The result? According to the authors, "the jury was so mesmerised that it returned a unanimous judgment of $550 in damages. . . . When Judge Wright collected his wits, he reduced the judgment to the Court's legal limit of $150."

Rule of law

COMMENTS about the rule of law emerge as a by-product of most conflicts between the executive and judiciary. This year produced a bumper crop. Although most of us have a basic understanding of the principle, it is appropriate to be reminded of its meaning from time to time. The following is from an address delivered by Paul Fraser QC, the President of the Canadian Bar Association (from a bulletin published by the Centre for the Independence of Judges and Lawyers, October 1982):

> [W]hen we speak of the rule of law we are referring in a shorthand

way to those bundles of rights and obligations known in other contexts as "fundamental freedoms" or "human rights". . . .

. . . .

[I]t seems to me there are two general aspects of the rule: first, people should be governed by the law and obey it; and, second, the law should be such that people will be able to be guided by it. Each of these aspects is dependent on the other and obviously we must have both if the rule of law is to flourish.

No society may be said to have the rule of law unless its citizens are able to find out what the law is, otherwise, how are they able to act on it? In order that there be respect for the law, the system that creates and administers it must, in my view, observe at least six particular and fundamental requirements:

First: Laws should be prospective and not retroactive. Those who are to be governed by the law must know that the rules will not be changed after the fact.

Second: Laws should be open and clear. Those who are to be governed by the law must be able to understand it.

Third: Laws should be relatively stable — for if the law is in a constant state of flux, people will be tempted to abandon efforts to be guided by it.

Fourth: Principles of natural justice must be adhered to in order to promote respect for the process of the law.

Fifth: Courts and legal services must be accessible.

Sixth: The independence of the judiciary must be guaranteed. If the Courts are not free to apply the law, the task of finding out what law will be applied becomes impossible.

It is part of the Bar's traditional duty to help and ensure that these fundamental requirements are met. The extent to which we are committed to do so and successful in doing so, will determine whether we can legitimately add a seventh requirement of an independent legal profession.

John McManamy

The plight of Parliamentary counsel

BECAUSE words are the lawyers' stock in trade, it is not surprising that the English language has occupied the minds of many of our foremost legal scholars. Sir Robert Megarry is consistent with this tradition. In his entertaining book, *Miscellany-at-Law* (Stevens & Sons Ltd, 1955) the learned Vice-Chancellor devotes two chapters to the topic. For the purposes of this note, we will look at only one chapter, where the focus of attention is on the art of the Parliamentary counsel. Megarry quickly recognises the unenviable position of the draftsman:

> In a sense, the scales are heavily weighted against the draftsman: if he has made himself plain, there is likely to be no litigation and so none to praise him, whereas if he has fallen into confusion or obscurity, the reports will probably record the results of the fierce and critical intellects of both Bar and Bench being brought to bear on his work.

Witness Megarry's examples (taken from reported judgments):

> This interesting question is considerably complicated by the simplifications introduced by the new property legislation.
>
> After recognising the importance of the case not only to the parties themselves but also for future cases, he had observed that the Judges below had "embodied in their judgments an appeal for guidance so touching as to recall the prayer of Ajax — 'Reverse our judgment as it please you, but at least say something clear to help in the future.' In the state of the authorities this is, I think a reasonable request."
>
> I regret that I cannot order the costs to be paid by the draftsmen of the Rent Restriction Acts. . . .

In sympathy, however, Judges have noted the difficult medium with which the draftsman works (again from reported judgments):

> [T]he meaning of a sentence may be more than that of the separate words, as a melody is more than the notes, and no degree of particularity can ever obviate recourse to the setting in which all appear, in which all collectively create.
>
> [A] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used.

And last but not least, eager to upset the draftsman's best efforts is the ever-imaginative lawyer, as witnessed in the following judgment:

> The only remaining question is, were these goods exposed for sale on the outside of the shop? It is here that the poetical imagination of [counsel for Mr Cavanagh] has run riot. He says this place is not the outside of the shop. Where is it, then? Is it the inside of the shop? He says it is; and it is so because he builds an imaginary wall from the extreme edge of the covered space, which is all Mr Cavanagh's own ground, up to the sky, and when this wall was built, he says it is the outside wall of the shop, and the

goods are not then exposed on the outside of the shop. When this wall is built of stone or bricks, or timber, or any other substance of a tangible kind, there will be no exposure for sale on the street, and that which was outside will become inside; but until that is done, I decline to construct a non-existent wall, and to construe an Act of Parliament by giving to "airy nothings a local habitation and a name". When "Snout, the tinker", represented a wall, he brought with him some roughcast and stone; we are to be more fantastic than the "Midsummer Night's Dream", and to build a wall without even the smallest shred of gossamer to assist us. . . . If I give loose reins to my imagination, I do not know where I can stop. If inclined to be poetical, the last subject I shall choose for my muse will be anything connected with the streets of Dublin.

"Complementarity" and the law

THE following is from a judgment of Holland J (*BCNZ v Metropolitan FM Broadcasting Ltd and others* (High Court. 24 Nov 1982 (M 363, 364/82)): Some confusion has arisen because each of the applicants, recognising that there were to be two warrants, also recognised that it was desirable that the operations be complementary one to the other. From this there developed the concept that the dreadful word "complementarity" was to be regarded as the telling factor. The reliance on complementarity was, however, chosen more by counsel in their submissions than the Tribunal itself and too much emphasis has been given to this term in the argument on appeal.

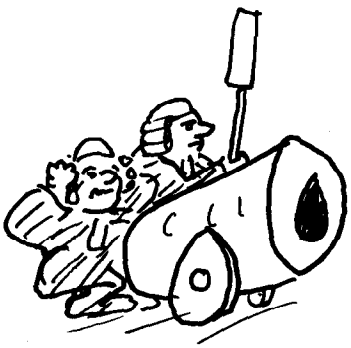
In a specialised field there is a risk of jargon replacing the ordinary use of English language. The words chosen by those who analyse the results of public surveys are often in some part to blame. In the field of broadcasting there are concepts somewhat peculiar to it under such headings as "stratification", "simulcasting", "demographic philosophy", and I was somewhat frightened to hear that one of the parties had conducted what was described as a "psychographic survey". There is a risk of such terms becoming shibboleths, the precise meaning of which is known only to those practising in the specialised field. A judgment of a Court should be capable of being understood by any reasonably educated person who reads it. So should a decision of an administrative tribunal. It may not lie well in the mouths of the Judges to pass such comments in view of their historical reliance on the use of Latin tags but such are being referred to less and less. The Court is not willing to be a party to adding "complementarity" to the list of terms, particularly as its true meaning can hardly be appropriate.

Citations — a reminder

IT is always important to remember that the statements of Judges, however exalted and demanding of the utmost respect, are still judicial statements applying the principles to the particular facts of each case. They are not statutes or statutory statements to be construed or applied as such. Greig J in *Stollery v Brunton Patton Real Estate Ltd*, High Court, Hamilton, 21 August 1981 (A144/81).

Worth quoting

"A lawyer without history or literature is a mere mechanic, a mere working mason. If he has some knowledge of these he may venture to call himself an architect," Lord Denning, from a speech at an admission ceremony of 26 July, his last official function as Master of the Rolls.



Tax avoidance — what's in a name?

A O Ferrers

In this short piece, the author proves that tax — to excuse the pun — need not be dull.

> *What's in a name? That which we call a rose*
> *By any other name would smell as sweet.*

SOME years ago I posed the question in somewhat doubtful grammar: is tax avoidance a dirty word? It looks as though this may be coming to pass. The reader may be fortified in this view by being able to discover the term in this year's budget. That term occurs in the form of a sub-heading and is uttered almost as if it connoted something unclean.

When I came to this area of the law some twenty years ago, there was a great gulf fixed between tax avoidance and tax evasion. Evasion usually involved, and still does, falsifying of returns in some way or another. We all feel that within us there is a great work of fiction, but Mr Tax not surprisingly has some objection to receiving each taxpayer's great work in annual instalments. He is at pains to point out that it is a mis-quotation to say "no tax without misrepresentation". Nowadays the terms tax evasion and tax avoidance seem almost to be interchangeable by some — they are becoming quite confused. Is the next stage to be that the terms will be treated as synonymous with "tax planning", and then with taking advantage of tax incentives, which of course, have been introduced by the Government? Even that pillar of reference prose, the *Financial Times* of London, on 20 September 1979 carried a multicolumn banner heading, "The Unacceptable Face of Tax Avoidance". So the theme is not new. Indeed some tax avoidance, which was, and is, not exactly squeaky clean, has been around for some time.

In Australia, as you might imagine, they have gone overboard and created a burgeoning tax avoidance industry. What else can you expect from the country which gave birth and nurture to the original confidence men? And what exotic names! Bottom of the

Harbour schemes, wet Slutzkins, dry Slutzkins. What next?

Hearken to these words: "If a man so conducts his affairs that he places himself outside the operation of an Act of Parliament, he cannot be said to be either evading it or defeating it. He has done nothing that is unlawful, and he has done nothing that calls for adverse comment from the Court."

Believe it or not, these words fell from the lips of a learned Judge of the English Court of Appeal some fifty years ago. True, it was a company law case, but he could well have been talking of our current income tax legislation. Is there any difference in principle?

At about the same time Lord Upjohn is reported as having remarked that no commercial man in his senses was going to carry out commercial transactions except on the footing of paying the smallest amount of tax involved.

What, then, is morally culpable about a taxpayer (or perhaps rather a tax-non-payer) so getting himself organised that he falls outside the tax gatherer's net? Mr Taxpayer may quite lawfully ensure that he enjoys an exemption or an incentive or a provision within the Act which causes him to pay less tax than he might have done otherwise. Best of all if he can put himself in a position which attracts no tax at all. The famous David Frost did just that. To start, the general tax commissioners found for him unanimously. Although Mr UK Tax took him all the way to the House of Lords, the head count came out at 9 to nil in favour of Frost. That's the sort of score the Maoris would be happy to have against Wales.

Frost was probably lucky to get his House of Lords judgment in February 1980. Since then in *Chinn, Ramsay* and *Burmah Oil* the House seems to have set its face against tax avoidance schemes — fiscal tricks if you like — at least in capital tax cases. Anyway it has long been said that it is better to be lucky than rich. David Frost seems to have the best of both worlds.

What is and what is not acceptable tax avoidance is probably a matter of degree. The *Financial Times* was moved to print on the topic by virtue of the Court of Appeal judgment in the *Ramsay* case. Templeman LJ delivered the first judgment and opened by saying:

> The facts . . . demonstrate yet another circular game in which the taxpayer and a few hired performers act out a play; nothing happens save that the Houdini taxpayer appears to escape from the manacles of tax.
>
> The game is recognisable by four rules. First, the play is devised and scripted prior to performance. Secondly, real money and real documents are circulated and exchanged. Thirdly, the money is returned by the end of the performance. Fourthly, the financial position of the actors is the same at the end as it was in the beginning save that the taxpayer in the course of the performance pays the hired actors for their services. The object of the performance is to create the illusion that something has happened, that Hamlet has been killed and that Bottom did don an ass's head so that tax advantages can be claimed as if something had happened.
>
> The audience are informed that the actors reserve the right to walk out in the middle of the performance but in fact they are the creatures of the consultant who has sold and the taxpayer who has bought the play; the actors are never in a position to make a profit and there is no chance that they will go on strike.

In introducing the Income Tax Amendment (No 2) Bill this year, Mr Falloon had this to say:

> In particular, [the Bill] contains significant measures aimed at curbing the growing tendency for some taxpayers to avoid meeting their fair share of the tax burden. . . . Such taxpayers have been able to gain an undue advantage through the tax system . . . often for a significant number of years.
>
> [I]n some cases the payment of tax has become voluntary. That is clearly an untenable situation which must be tackled by any responsible Government, particularly when there is considerable growth in such mechanisms being used by those advising the general public on taxation. One sample survey . . . showed that the average amount of loss deducted against personal or professional income was $19,224 with 24 people claiming over $100,000.
>
> [T]he shelters these people were involved in transferred losses of $12,169,015 in the tax year ended March 1981 to be offset against other income . . . [n]o responsible Government could allow such a large-scale avoidance of tax, either deferred or permanently saved, to continue.

But having said all this, you pay tax only if you fall within a particular charging section of a taxing statute. If you can put yourself outside that charging section, there is nothing wrong with that. Is it inequitable that you can do that and someone else cannot? Lucky is, I think, the more appropriate word.

Upon our s 99 of the Income Tax Act 1976 appearing in its present form, our Mr Tax reiterated his black and white formula of what he for one would accept as proper estate planning and what he would not. Maybe this utterance and the plethora of cases, mostly won by Mr Tax on the old s 108, has dissuaded the New Zealand taxpayers from taking part in smart-alec type of tax avoidance schemes.

So far we have not had any cases on s 99 as it presently stands. It has been said, or should I say rumoured, that Mr Tax's approach to this section may be likened to a teenager's approach to extra-marital sex — he is excited by it, he wants to try it, but above all, he wants to get it right the first time.

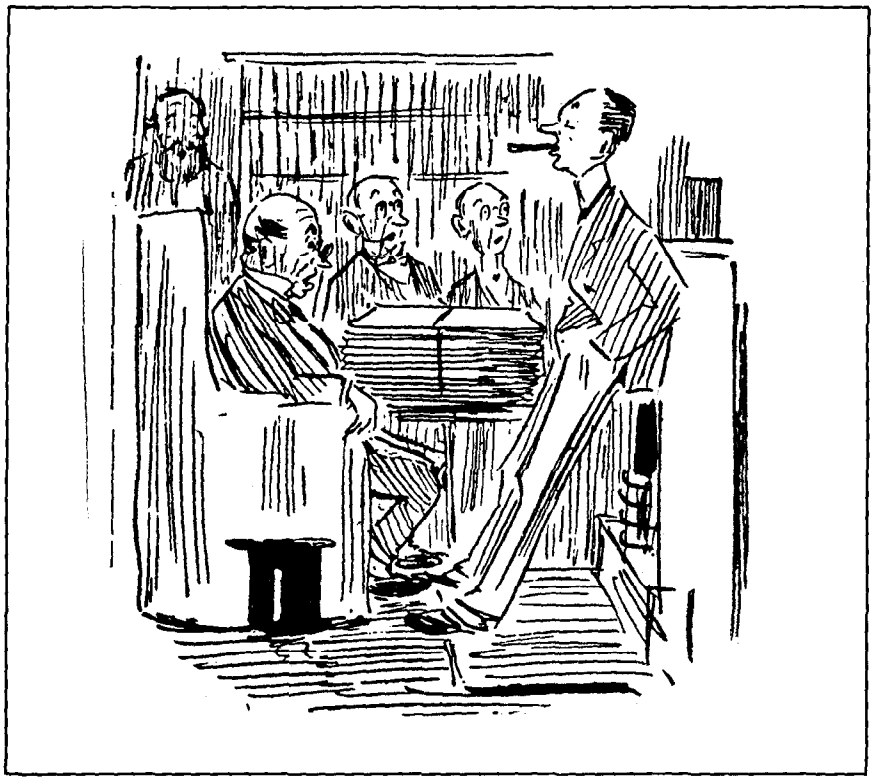
I write this on the eve of the Melbourne Cup. This means that Christmas is not too far away. So may I wish you all a happy Christmas and happy holidays. Just make sure before you finally slam the office door that in your strong room you have your valid will that is right up to date.

Bryce Hart remembered

Those who have been around are familiar with the wit of Bryce Hart, who practised earlier this century. The late F J Cox, who was Hart's long-time friend, put together the following portrait. Many will recall some of the stories, and it is hoped these will be enjoyed in the spirit of one perusing photos in a family album. For many others, the collection is a fitting introduction to a memorable personality.

WALKING down Shortland Street, not too early on a working day, one was likely to encounter a tall debonair figure immaculately attired, with bowler hat set at a rakish angle, carrying a cane, and wearing an exotic waistcoat and possibly spats. Ever ready to engage in a kerbside conversation the usual welcoming salutation would be prefaced with "Have you heard this one?" That is the image that one conjures up of Bryce Conrad Hart, Barrister and Solicitor of Takapuna, Auckland. He boasted that his home commanded an uninterrupted view of the Rangitoto Channel beacon overlooking three mortgages and a builders lien, but it had the advantage of being only a "bottle throw" from the Mon Desir Hotel.

He was a man of many parts — columnist, raconteur, after-dinner speaker, actor, and acknowledged wit in and out of Court. Alive he was brilliant. When he passed on he became a legend.



In the early and middle part of the century there was no better known legal personality in Auckland. His many stories, both legal and otherwise, and his witty quips and asides were legion, and were acclaimed by lawyers and the general public. He was an experienced after-dinner speaker and as such was very much in demand. At Bar dinners held in Auckland he was usually chosen to propose a toast or to reply to a toast. When appearing in the Courts he found it difficult to refrain from using a pun, quip or clever epigram when the occasion offered, much to the amusement of Bench and Bar.

One morning in the Police Court at Auckland, Bryce was appearing in defence of an accused who was charged with discharging a deleterious substance from the person in a public place, to wit, the paling fence surrounding a certain suburban Anglican Church. Addressing His Worship, counsel exclaimed "I appear for the accused, if Your Worship pleases. My client is an EPISCOPALIAN."

On another occasion, Bryce's client appeared in the Magistrate's Court in a pair of tennis shorts and open shirt. The presiding Magistrate who was a stickler for Court etiquette said "Mr Hart, I am surprised that you allowed your client to appear in my Court improperly dressed".

"I apologise Your Worship", replied Bryce. "I submit however, that he is properly dressed, but is in the wrong Court."

One evening Bryce was joined at his Club by a friend who had brought with him a visitor, a traveller for an English firm dealing in cigarettes and tobacco. The latter was complaining bitterly of his treatment at the hands of the Customs Department who had mulcted him, so he alleged, in excessive customs duty. His companion suggested that he should seek legal advice and said "Here is my lawyer friend Mr Hart. I think you should consult him". Bryce agreed to see him "at his chambers" next morning at 10 am. He gave his considered opinion as follows:

"I have gone very fully into the circumstances of your case, Mr X and I have been able to find in my extensive library a case on all fours with yours in 20 Benson & Hedges at page 199. I regret however that the decision is against you and I fear that I must advise you that like Nelson you have 'done your duty'."

The "chambers" referred to comprised a single room in Shortland Street and the "extensive library" contained the *NZ Official Year Book*, *Pears Encyclopaedia* and short shories of P G Wodehouse and Stephen Leacock.

As likely as not a practitioner wishing to have an affidavit taken by Bryce would be sworn on Professor Leacock's *Moonbeams from the Larger Lunacy of Literary Lapses* instead of the Good Book. (Speaking of affidavits, on one occasion a coach load of Auckland practitioners was journeying to Whangarei to attend a Bar dinner there and arrangements had been made to

pick up certain Takapuna lawyers including Bryce en route. As Bryce entered the bus he asked "Would anyone take an affidavit?")

Living as he did near a beach at Takapuna, Bryce was a very good swimmer. He delighted in relating how as a youth, a spectator complimented him on his aquatic prowess and asked him how he had learned to swim. Bryce replied, "Well, my father, who was a schoolteacher, took me as a small boy down to the Takapuna wharf (there was a wharf there in those days) and simply threw me into the tide."

"Surely that was a little drastic, was it not?" asked the spectator.

"Well I suppose it was," replied Bryce, "but the most difficult task was getting out of the sack."

Later his aquatic ability stood him in good stead. He was commuting from Takapuna to the city on the ferry and when embarking missed his footing and fell into the tide. When he emerged from the deep he was still wearing his bowler hat and holding his brief case (briefless of course) high above his head. Whether or not he was wearing his spats that morning was not recorded.

Bryce was meticulous in his sartorial appearance and was considered one of the best dressed men about town in his day. His wardrobe contained several exotic waistcoats and he was inordinately proud of a mustard coloured one much worn by him in the Auckland winter. On one occasion he appeared in the city in his morning suit preparatory to attending a Government House garden party in the afternoon, resplendent in spats, tall hat, gloves and all. Upon entering the lift of his office building one of the passengers seeing this Beau Brummel entering exlaimed sotto voce, "Good Lord". Bryce quickly replied "No, Bryce Hart, 2nd Floor."

He told me that upon arrival in England, his great ambition was to meet A P Herbert MP, and he dressed himself suitably to meet the master wit. He was surprised when the great man was dressed in a singlet and shorts. His host was also taken aback, and said, so Bryce related, "I thought all you New Zealanders were pretty down to earth and dressed accordingly."

Bryce replied "Yes, but I am the immaculate exception."

It would have been remarkable if much humour did not permeate the domestic scene in the Hart menage. And so it did. In the "Letters to the Editor" columns of the *Herald*, a humorous correspondent ensued upon the question, "Should men surrender their seats to women in buses?" between "Mother of Ten" and a supporter of the stronger sex. The correspondence was long and sometimes acrimonious and quite unknown to each other the respective protagonists were Bryce and his daughter. Bryce was "Mother of Ten".

Friends visiting Bryce in hospital shortly before he passed on found him whimsical to the last. One lung had been removed and he knew his days were numbered. He said that he was contemplating changing his nationality and executing a deed poll changing his name. He had not quite decided whether it would be "ONE BUNG LUNG" or "ONE LUNG YET".

I visited him shortly before he passed on. He was heavily sedated and was unable to speak. I recalled to him several of his stage successes, "The Dying Swan", "Tilly of Tamaki", "Bill Stoney" and many others, to all of which he nodded ever so slightly. When I mentioned his immersion off the wharf I detected a slight smile. Poor Bryce. It was a sad parting. The wit was silenced. I fought back a tear as I left his bedside.

He was my lifetime friend, and I saw him almost daily either at the Auckland Officers Club or some legal function. During World War I he was a patient with me in Forrest Park Hospital, Brockenhurst, Hants, and I travelled with him twice from England to New Zealand, once in 1918 with a complement of wounded officers and other ranks, and again returning from the Empire and Commonwealth Legal Conference held in London in 1955. When he and I returned from the War together late in October 1918, we were met with the news that our respective brothers had been killed in action (my own brother only 10 days before the Armistice). This cemented a lasting friendship which submerged all shortcomings and imperfections.

It would be a poor world without its Bryce Harts. Jests, witticisms and good stories lighten the gloom of wars, rumours of wars, depressions, credit squeezes and inflation.

> "A fellow of infinite jest of most excellent fancy"

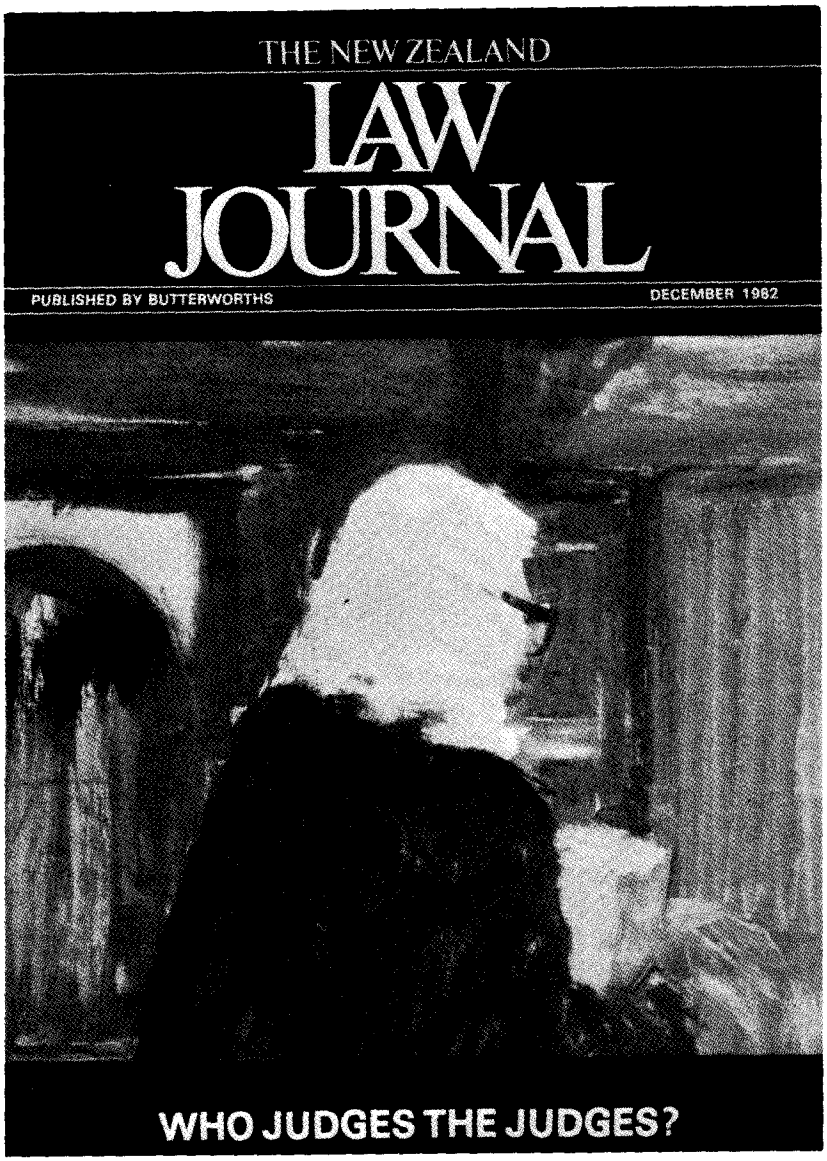
In these words, Hamlet remembered poor Yorick. So too do many Aucklanders still remember another "Court Jester", Bryce Conrad Hart.

HOLIDAY GREETINGS

Getting into the spirit of Christmas is the editor and his unsuspecting daughter, Emily. On behalf of the staff at Butterworths, all the best wishes for the holidays and New Year.

N J Jamieson
Senior lecturer in law
University of Otago

Late last year the Modern Law Review published a two-part article that took the Law Lords to task for their apparent inconsistency in their reasoning. The article attracted widespread comment, including a short note that appeared on p 269 of the August NZLJ. In the following article, the author makes a considered response — and vindicates Their Lordships in the process.



Attacking the Law Lords

"Who will judge the Judges?"

"We will", reply the dons. "It is our heritage. Legal history proved the Judges to be pragmatists. They not only took sides with Parliament, holding that it could 'do no wrong',[1] but, by reversing a long line of cases on the prerogative,[2] changed sides against the monarchy."

So much for the status of dons (as seen by a don), but what is their worth in judging the judiciary? One of the most recent expressions of the age old antipathy in legal outlook between dons and Judges is the attack by two lecturers in law, W T Murphy and R W Rawlings[3] from the London School of Economics. Their paper purports to be an observationally descriptive and thus largely non-evaluative account of judgments in the House of Lords. It professes to "exclude discussion of the merits of the decisions or the motives which underlie them, although . . . sometimes consider[ing] the adequacy of the arguments deployed." For reasons about to be discussed, Murphy and Rawlings cannot be regarded as having lived up to their aspiration of neutral description. Indeed, Walter Merricks, when writing non-alignedly of their work in the *New Law Journal*, has no hesitation in entitling it an attack on the Law Lords.[4]

Murphy and Rawlings set out to examine ". . . the way in which decisions were presented and the reasons, if any, offered . . . based on a consideration of the speeches made in the Appellate Committee of the House of Lords during the 12 months beginning October 1979." Their analysis and conclusions are conveyed in a lengthy two-part paper of some 67 pages. The first part deals with those judgments of the House of Lords which are written with reference to statutory text. The second part deals with those judgments which do not relate to statutes.

Murphy and Rawlings conclude that the Law Lords are, at least in the extremely selective instances examined: suppressive . . . assertive . . . dismissive . . . particularist . . . evasive . . . consequential . . . prolix . . . implicative . . . casual . . . jejune . . . pre-emptive . . . speculative . . . highly abstract . . . lacking in explanation . . . repetitive . . . literalist . . . constitutionalist . . . rhetorical . . . discursive . . . imputative . . . apparently digressive . . . dense . . . elusive . . . spare . . . downplaying . . . conflative . . . pejorative . . . evanescent . . . mysterious . . . and disturbing.

On these, themselves highly pejorative terms, the presentation of their Lordships' judgments was seen by Murphy and Rawlings to be obviously[5] subjective and arbitrary — although interestingly enough Murphy and Rawlings did not use these relatively non-emotive terms, nor consider the notions for which they stand. Had they done so perhaps they would have become aware of the subjectivity and arbitrariness inherent in their own judgment of the Law Lords, and thus reduced its damning effect by way of self-judgment on themselves.

As to the way in which the Law Lords compose their judgments, they are said no less emotively by Murphy and Rawlings to: "manoeuvre", to "slip away", to "deploy", to "despatch", to "resort to devices", to "employ strategems", to "tunnel into case law", to pursue "a negative deployment of history", to put "into the bunker of

history", to "weave tapestry", to "present overviews", to "knit together", to produce a "speech like a chess-board over which the pieces are moved with bewildering speed", "to invoke imagery", "to hint", to "summarily dismiss", to "rapidly move off-stage", to "shore-up", to "be concerned to undermine the position of [other judges]", to "cast veils", as well as "to unveil", and — for what appears, despite Lord Atkin's classic judgment in *Donoghue v Stevenson*, to be an anathema for contemporary jurisprudence — to "invoke the Bible". It is hard to recall with any great seriousness, when this language is used of the Law Lords, that their critics expressly disavowed themselves to be concerned with their Lordships' motivation.

To explain these epithets as they are evoked with a curious repetitiousness against the Law Lords, Murphy and Rawlings take issue with the way in which their Lordships rely on ordinary natural meaning, common sense, and the ordinary man. They also take issue with what their Lordships do when they do not rely on ordinary natural meaning, common sense, and the ordinary man. They take issue with the Lords when their Lordships speculate, and they take issue also when they do not speculate. They take issue when their Lordships attempt to deal with the many sides of any complex question, and they take issue also when their Lordships attempt to cut the Gordian knot, cleanly and decisively, by dealing only with the side of the question which they intend to support or against that which they propose to fall. In short, for all of Murphy and Rawlings' 67 pages, the Law Lords can do little or nothing right.

Academics versus Judges

In the name of scholarship Murphy and Rawlings cannot go unanswered. In the first place it is ludicrous to preface such a lengthy publication, on such a crucial subject, and coming to such controversial conclusions, with the disclaimer that all or everything in it may prove atypical. What this disclaimer signifies is a denial of academic responsibility. The examination may prove quite unrepresentative and thus exceedingly partial. In the second place it is even more grievously a deficiency of scholarship to put their Lordships in the position that they can do no right by definition. The criteria by which the dons have dared to judge the Judges are drafted in the form of an almost Pythagorean contradiction of opposites. If the Law Lords are not "discursive" then they are guilty of being "spare", "casual", and "dismissive". If they are not "evasive" then they are "digressive". If they are not "particularist" then they are "highly abstract", "consequentialist" or "constitutionalist". If they are not "speculative" then they are "pre-emptive". On this score the Law Lords can never be right, nor does it seem intended that they can ever be right, for Murphy and Rawlings indicate no middle way by which to navigate their pre-defined Scylla and Charybdis. Although to reach a conclusion on these matters now is to anticipate what immediately follows as a most fundamental question, it is hard to avoid viewing these sequences of semantically imposed dilemmas as other than attempts, in the dons' own terms, to manoeuvre, deploy, despatch, summarily dismiss, and to employ strategems and resort to devices woven and knitted, not however by the Judges, but by the dons themselves to undermine the position of the Judges. Unless Murphy and Rawlings' arguments can be rationally substantiated, the length and unmitigated forcefulness of their attack can only be construed as a propagandistic means of discrediting judicial authority.

The question now is who will judge the dons who judge the Judges? If Murphy and Rawlings are right, and correctly describe a judicial process in which Judges never or rarely ever steer a middle path in any of the judgments examined, theirs is truly a damning document for the judiciary. If Murphy and Rawlings are wrong, even though the Judges also be wrong (albeit in so many other ways), then the document is a damnable one for dons in the cause of scholarship. By the publication of their paper Murphy and Rawlings have on their own initiative put at stake not only the judicial process of the Law Lords, but the cause of fair, informed, and impartial academic scholarship.

Who then will judge the dons who dare to sit in judgment on the Judges? Unlike the dons, the Judges govern the country. Together with the legislature and executive, the judiciary makes up the basically tripartite constitution. In the absence of any fundamental law imposing a responsibility for government, the question of how to evaluate judgments passed on the judiciary can be answered only by a logic of judgment.

It is likely that legal commentary and curial judgment share the same common logic. "Judge not that ye be not judged" is not so much a prophetic threat as a statement of logic. It declares that the fate of those who judge, college dons and Court Judges alike, is to be judged against their own judgment. The academic lives or dies entirely by his own hand no less than the Judge binds himself for better or worse by the consequences of his own judgment. The history as distinct from the logic of legal scholarship within the common law has, as a result of over reaction to the divine right of kings, isolated dons from Judges. This largely explains the different status of academic commentary for common lawyers and civilians. The revolution by which the judiciary parted company from the universities who continued to support the Crown in taking a principled stand on the divine right of kings has disguised the common logic of judgment and legal commentary. The failure of academics to resurrect the medieval responsibility for government as a legal doctrine, and the resulting secularisation of the English common law with Parliamentary sovereignty as its grundnorm has meant the decline of academic commentary as a forceful source of common law. It has also, so it would seem from at least the article under review, taken its toll on standards of legal scholarship.

The inability of legal academics to provide an authorised source of common law has perhaps only served to intensify the antipathy felt between those who once served allegiance to the same but now serve different legal grundnorms. Academics versus Judges may no longer identify differing commitments towards natural law and legal positivism, but that ". . . the dons are so hard on the Judges, and the Judges so rude to the dons"[6] is a clearly continuing and unfortunately sometimes hollow conflict.

Murphy and Rawlings conclude their account of ". . . how particular judgments in particular cases are 'glued' together" without drawing ". . . conclusions about the typicality of what [they] present". They purport to ". . . deal primarily with the surface level of the text" without reference to "biographical information on the Judges . . . the institutional environment in which [the text] is produced . . . the group interaction which may have preceded the

publication of the final text . . ." or ". . . what ideological or political functions the texts might perform". In short — although for 67 pages Murphy and Rawlings are by no means that short — what they purport to do is simply provide a description. Although they may sometimes consider the adequacy of judicial reasoning, their main purpose is to examine, observe, and record within the four corners doctrine of textual construction. As an indication of how far that which was once orthodox or traditional (in the form of analytic) jurisprudence has now given way to psychoanalytic, sociological, and anthropological jurisprudence, Murphy and Rawlings have been put at pains to say not so much what their analysis is, as to what it is not. Interestingly enough, however, their chapter headings, footnote references, and headnote quotation from Thurman Arnold, no less than their provocatively ambiguous title itself, continue away from the orthodox jurisprudence of abstract legal reasoning to follow the high fashion of economism, Kuhnian paradigms, structuralism and politics. Murphy and Rawlings may have denied themselves the cake of contemporary jurisprudence, but they have not done without its icing. What most concerns them is made to masquerade as old-fashioned, non-emotive, safe, academically dry, and even tedious, but above all academically sound jurisprudence. Unfortunately they are unable to put this profession into practice or even to sustain its mere profession to the end. Their own last sentence is a complete giveaway as to their real concerns, "ultimately . . . [in their being] led to questions of power and of how power circulates within a society" (p 617). In the end they are not so much concerned, despite their earlier insistence otherwise, with the legal way in which the Law Lords function, as with the fact that society accords them immense political power.

Evaluating the attack

Murphy and Rawlings attacked the Law Lords, as they first admitted in an extremely selective way, and can hardly complain if the space of this paper obliges the same extreme selectivity by way of reply. Unlike Murphy and Rawlings' findings for which they disclaim typicality, however, no such disclaimer is made in the present case. To disclaim typicality as do Murphy and Rawlings in a most lengthy but explicitly "extremely selective" examination in which all instances are concluded to the discredit of the subject examined, itself admits to partiality. Impartiality is the essence of analytic as of no other school of jurisprudence however, just as to break through superficial enquiry and reach a new depth of understanding is itself the essence of any jurisprudence. The following typical examples are given by way of evaluating the so-called academics' attack.

The Law Lords are criticised, sometimes for being assertive, at other times for being suppressive. Indeed their Lordships are even criticised for "the assertive manner in which they are suppressive". Murphy and Rawlings thereby note, but fail to understand the way in which the rhetoric of assertion and suppression works in the communication of judicial as of other decisions. To leave aside "the 'effect' of the judgment as a *decision*" is to overlook the essence of judgment.

The Law Lords have a duty to be decisive. They sit in final appeal. To be decisive they need to be assertive, and to be assertive in some directions they may need to be suppressive in others. Out of context, this assertiveness and suppressiveness may appear arbitrary. But Murphy and Rawlings recognise "contextuality" — at least in the abstract even if they fail to understand the way in which it undercuts their arguments. The rhetoric of communicating decisions can be described and evaluated only in the context of a logic of decision-making. In less abstract terms, every curial decision (and underlying judgment intended to support it) must be read in context with the arguments before the Court, and, in the case of any appeal, with its prior lower Court history. This context widens in accordance with the doctrine of precedent at least to the extent Lord Wilberforce indicated in *Express Newspapers Ltd v McShane*:[7]

> My Lords, most of these cases which have preceded the present proceed upon the basis of an objective test, though the nature of the test is expressed without complete consistency, Ackner J in the *United Biscuits* case neatly stated the alternatives available. I do not go through these cases because though contributing to a solution of the present difficulty they provide no certain guide and because your Lordships are not bound by them.

Murphy and Rawlings find this to be an example of "suppress[ing] 'wider considerations' " that are "adroitly devalued". If one looks for the exhaustive embodiment of context that Murphy and Rawlings require of each Law Lord's judgment, however, then they not only aspire to perfectionism in communication but are guilty of attempted "particularisation" or reductionism (whereby complex "issues" are reduced to manageable proportions) adduced by themselves against the Law Lords. To expect each Law Lord to particularise or reduce the context of his judgment to such manageable proportions as can be fully accounted for within his judgment is itself particularism of the most flagrant sort.

The Law Lords are further criticised for a failure to provide explanations. As an example of this the judgment of Lord Scarman is quoted in *Re Racal Communications Ltd*:[8]

> I do not find these cases helpful in construing s 441(3) of the Companies Act. They proceed upon a view of the true construction of s 31(1)(h) of the 1925 Act. . . . These cases depend upon the particular wording of the subparagraph and offer, I think, no guidance as to the meaning of s 441(3).

Murphy and Rawlings go on to say of this judgment that "why the cases provide 'no guidance' is not explained". But it is explained — even expressly in the very words quoted by Murphy and Rawlings. The cases are unhelpful because, as Lord Scarman says, "they proceed upon a view of the true construction of s 31(1)(h) of the 1925 Act . . ." and not s 441(3) of the Companies Act 1948. Now one may disagree with Lord Scarman's explanation. That is one thing. But to say that he gives no explanation at all is untrue. This is not any sort of fair dealing with the common law text, not even (to use Murphy and Rawlings' jargon) "primarily with the surface level of the text". It is a falsehood at all levels, and for academics to maintain, or as it may be obtain a clear view of what scholarship is all about, it seems that the fact of its falsehood may have to be reiterated to the same point of repetitiousness for which Murphy and Rawlings criticise the Law Lords in their attempts to drive home the truth.

This typifies the standard of Murphy and Rawlings' criticism of the Law Lords. How can we evaluate their criticism? We have already suggested

that a logic of judgment exists which is common to college dons and Court Judges. It is true that beyond this common level of logic, other more complex hierarchies of logic stretch endlessly into academic abstraction. Because Murphy and Rawlings fail in their own work to measure up to the standards they require of others, we need only examine this first level of logic now in more detail and need not explore what lies beyond.

The common logic of judgment itself operates on two levels. In the first place it can be seen to be self-referential. "Judge not that ye be not judged" simply means that every judgment logically entails self-judgment. Thus Murphy and Rawlings are logically bound to demonstrate whatever faults and failings they themselves suffer from by the way they choose to demonstrate those of the Law Lords. To see this self-referentiality of judgment depends on axiomatic recognition. It is either self-evident, or not seen at all. Secondly, and less rigorously, the common logic of judgment may be satisfied with consistency or reciprocity in place of logical entailment. The judicial process must operate subject to the same demands it makes of others. Those who dare to judge must practise what they preach. Thus if Murphy and Rawlings are to succeed, then they must themselves avoid all those faults, from assertiveness to dismissiveness and beyond, for which they condemn the Law Lords. This minimum requirement of a judicial capacity on the part of those who dare to judge goes towards explaining the status of judgment properly so-called.

These two levels of the common logic of judgment can be explained more fully in academic terms according to the nature of predication. Every judgment, in evaluating the world, predicates as much about the Judge in his being an inherent instrument of predication as it does about the explicit subject of his judgment. Lawyers are more familiar with the metaphysics of predication in terms of the Rule of Law. No instrumentality of government can transcend the law. Those who throw the first stone, whether by way of legislation, judicial decision, or executive administration are in turn bound by what they throw. The same metaphysics applies to academic commentary. Murphy and Rawlings cannot escape the outcome of having their own standards of judgment against the Law Lords applied to themselves.

In short, for all of Murphy and Rawlings' 67 pages, the Law Lords can do little or nothing right.

If they are not "particularist" then they are "highly abstract". . . . If they are not "speculative" then they are "pre-emptive".

Nor does it seem intended that they can ever be right, for Murphy and Rawlings indicate no middle way by which to navigate their predefined Scylla and Charybdis.

Unlike the dons, the Judges govern the country. . . . The Law Lords have a duty to be decisive. To be decisive they need to be assertive.

Conclusion

In concluding that Murphy and Rawlings are to be judged by their own standards, the few but typical instances examined lead us to realise that Murphy and Rawlings have judged themselves to be "assertive", "dismissive" etc, and to such extent that we need not follow their own rhetoric of "repetitiousness". They quite understandably fail to substantiate that which they discover to be a fault in others, but which is after all a fault inherent in themselves. They have mistaken a profession of faith in scholarship with its active practice. More flagrantly they have done so without any curial excuse. Judges, unlike philosophers must decide disputes. They have the authority and status to do so. Whereas Judges assert authority, dons either reason — or else fail to be dons. It is true that Judges make judgments, but only in the context of making decisions. To overlook the contextual decision in criticising any curial judgment is to discredit the Judges and reduce the authority of law. That ought not to emanate from dons. At least dons, like philosophers, need not make decisions. They have that advantage over Judges — and in having that advantage have a greater responsibility than Judges that what decisions they make — as for example that the Law Lords are in disarray — are clearly supported by reasoned judgments. In this don's opinion, that so-called "suggestion" of Murphy and Rawlings remains unproved. Surely the *Modern Law Review* which devoted over 67 of its pages to the attack will publish what is required there no less by defence. What is now at issue are standards of scholarship no less than standards of legal judgment.

It may be that those, who like Homer always praise and never blame, are able to do so because they themselves are blameless. There must

be a lesson in that no less for the present author as Murphy and Rawlings. Nevertheless it is a failure of scholarship to hold and name present Law Lords to be "in disarray" for the fact of their giving different, and as they may (or may not) be, inconsistent judgments coming to the same decision. What the Law Lords have done accords with long established (albeit debated) methodology. Whether the advantages of independent reasoning outweigh the disadvantages of several and thereby possibly inconsistent judgments reaching the same decision is a moot point. It is nevertheless so much part of our judicial process as to allow conflicting judgments in support of the same decision to be part of our common law heritage. Why then hold the Law Lords of 1982 to be in disarray? Must judicial as well as academic independence, be subject to consensus politics? Dons themselves occasionally come to the same conclusions. They do so often with vastly different and sometimes outrageously conflicting reasoning. Both the present author no less than Murphy and Rawlings have misgivings over the ultimate effect of their Lordships' remarkable practice note. We thus can be said to come to many of the same conclusions. But because we do so for vastly different reasons, we must, as dons, be seen to be in disarray; and this most fittingly as a logical consequence of our own vastly different and mutually inconsistent judgments of the Law Lords.

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1 "An Act of Parliament can do no wrong, though it may do several things that look pretty odd:" *City of London v Wood* (1701) 12 Mod 669 at 687 per Holt CJ.

2 *Bate's* case (1606) 2 St Tr 371; *Darnel's or The Five Knights'* case (1627) 3 St Tr 1; *R v Hampden (The Case of Ship Money)* (1637) 3 St Tr 825; *Godden v Hales* (1686) 11 St Tr 1165. Cf *Prohibitions del Roy* (1607) 12 Co Rep 63; *The Case of Proclamations* (1611) 12 Co Rep 74. Cf what may be another about-turn in such cases as *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75. See however "Was Lord Coke a Heretic" Jennings, Sir W Ivor *The Law and the Constitution* (1959) 5th ed, Appendix III 318-329.

3 "After the Ancien Regime: The Writing of Judgments in the House of Lords 1979/1980" Part I (1981) 44 Modern LR 617-655, Part II (1982) 45 Modern LR 34-61.

4 "Law Lords: The Academics Attack" (1981) New LJ 1244.

5 No apology is proffered for this assertiveness: reality may be clear and obvious no less than appearance may be confusing and deceptive.

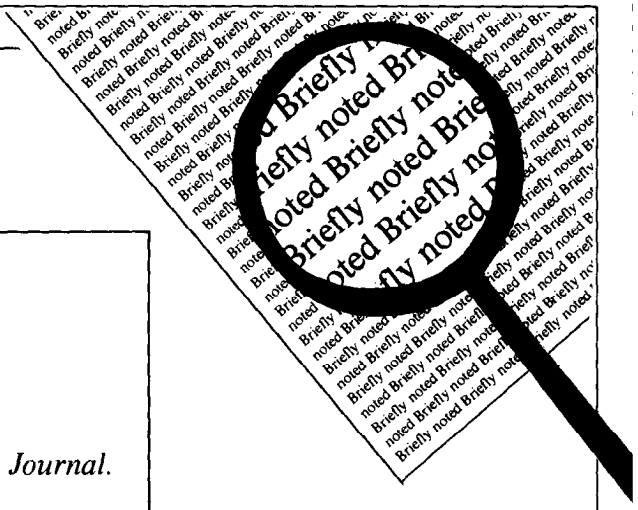
6 (1935) 51 LQR 568.

7 [1980] 2 WLR 89, 95.

8 [1980] 3 WLR 181, 197.

RECENT ADMISSIONS

Adams, S J	Auckland	29 October 1982
Bowie, H M	Wellington	27 August 1982
Boyle, A M	Auckland	29 October 1982
Brooker, M H	Auckland	29 October 1982
Brooks, B T	Auckland	28 September 1982
Burley, N A	Christchurch	13 May 1982
Caffinicos, K S	Wellington	6 August 1982
Cammack, B P H	Wellington	26 November 1982
Doyle, T J	Wellington	25 March 1982
Drower, C D	Auckland	29 October 1982
Dugdale, N W	Auckland	29 October 1982
Dyhrberg, M J	Auckland	29 October 1982
Edgar, M A	Auckland	14 September 1982
Ellis, M R	Auckland	29 October 1982
Ewen, S J	Auckland	29 October 1982
Falvey, R I	Auckland	29 October 1982
Fitzgibbon, A M	Auckland	29 October 1982
Fletcher, B J	Nelson	4 October 1982
Focke, P E J	Auckland	10 August 1982
Fournier, T W	Christchurch	1 October 1982
Friend, L M	Christchurch	31 March 1982
Fuller, T M	Auckland	29 October 1982
Gray, J P	Wellington	26 February 1982
Grout, K M	Auckland	29 October 1982
Hames, A L	Auckland	29 October 1982
Hamlin, P K	Auckland	29 October 1982
Harris, A J	Auckland	29 October 1982
Hay, R M	Auckland	29 October 1982
Hodgson, K W	Christchurch	5 April 1982
Howe, B	Auckland	29 October 1982
Hundleby, M P	Christchurch	20 October 1982
Hutchinson, S G	Auckland	29 October 1982
Lange, R B	Auckland	29 October 1982
Learmonth, P M	Auckland	29 October 1982
Lee, H C	Auckland	29 October 1982
Leggat, M J	Christchurch	28 October 1982
McCroskrie, P H	Auckland	29 October 1982
McDonald, A J	Wellington	14 May 1982
McLean, D M	Christchurch	26 May 1982
Malcolm, J C	Auckland	29 October 1982
Maloney, P K	Auckland	29 October 1982
Mercier, M J	Wellington	5 March 1982
Milne, P J	Wellington	18 June 1982
Mitchell, B N	Auckland	29 October 1982
Murphy, P J	Auckland	29 October 1982
Penny, H J	Wellington	9 July 1982
Petersen, B E	Auckland	29 October 1982
Prasad, R C	Auckland	14 September 1982
Roberts, K M	Auckland	29 October 1982
Robertson, L A	Auckland	29 June 1982
Rooney, M E	Auckland	29 October 1982
Rose, J G A	Auckland	29 October 1982
Ross, C W	Wellington	19 March 1982
Shaw, C M	Auckland	29 October 1982
Shorter, S F	Auckland	29 October 1982
Smith, M C	Wellington	5 March 1982
Smith, W A	Wellington	13 August 1982
Sprott, R M	Christchurch	15 November 1982
Storey, T I M	Auckland	29 October 1982
Stuhlman, R R	Auckland	29 October 1982
Taylor, C D	Auckland	29 June 1982
Taylor, P R	Christchurch	20 October 1982
Tuiasau, F N	Auckland	29 October 1982
Welch, C J	Auckland	29 October 1982
Williams, M A	Christchurch	26 May 1982
Wilson, C A	Auckland	29 October 1982
Wilson, [illegible]	Christchurch	29 September 1982
Wood, J H	Christchurch	13 October 1982
Wood, L A	Auckland	29 October 1982
Wright, K V A	Auckland	29 October 1982



Company reconstructions

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COMPANY mergers and reconstructions have gained publicity in recent years. An individual company, or a group of companies can be restructured following the procedure in s 205 of the Companies Act 1955. The procedure may be used by both solvent and insolvent companies. The formation of Fletcher Challenge, by the merger of Fletchers, Challenge Corporation, and Tasman Pulp and Paper, is perhaps the best example of solvent companies merging by means of the procedure set out in s 205.

When s 205 may be used

In general, the procedure in the Act allows a company to compromise with its creditors and shareholders so as to restructure the company without it proceeding into liquidation. Section 205 has been used to:

1. Place a moratorium on action taken by creditors. This can give an insolvent company the chance either to trade out of its difficulties, or to change its shareholding to the benefit of existing creditors.

2. Restructure equity capital. Share capital may be consolidated, divided or reduced.[1] Preference shares may be exchanged for ordinary shares and preference share capital reduced.

3. Restructure debt and equity capital. In a solvent company perpetual debentures may be exchanged for ordinary or preference shares. In an insolvent company, creditors may agree to receiving part payment in cash and the balance in shares or debentures.

4. Complete a takeover or merger. Shareholders in separate companies may agree to exchange shares, or may agree to take shares in a new holding company. The use of s 205 to complete a takeover has a number of advantages.[2] Savings in stamp duty can be achieved, but balanced against this is the cost of calling meetings to approve the scheme and then obtaining High Court approval. Section 205 has also been used to compulsorily purchase minority interests opposed to a takeover.[3]

Procedure to be followed

1. The scheme of arrangement is prepared and circulated informally to major shareholders and creditors who will be affected. This will anticipate any later objections.

2. Application is made to the High Court under s 205 for approval to hold the necessary statutory meeting. The application is dealt with in chambers. As a guide to practitioners, Barker J has indicated:[4]

(a) Applicants should provide the Court with full information concerning the class or classes of shareholders and/or creditors; where necessary, applicants should suggest the holding of separate meetings and should err in favour of holding separate meetings so that the rights of all classes of creditors and/or shareholders be protected;
(b) The power to adjourn the meeting should always be incorporated in the proposed order;
(c) Very comprehensive proxy forms should always be suggested.

Barker J said a proxy may not vote at an adjourned meeting without such a clear power given in the proxy form.

The scheme of arrangement before the Court, proposed a six month moratorium on creditors' claims. His Honour said:[5]

> It seems to me, at very least, the company should have provided the Judge with full particulars of the creditors and of their classes. It should have provided particulars of the secured creditors and of their security, together with a statement as to how the secured creditors would be affected by the proposal.

3. Notice of the meeting to consider the scheme is given to all shareholders and creditors. Section 206 sets out the information which must be made available to those attending the meeting so they may best judge the merits of the scheme. In particular, the circular must disclose any material interests of the company's directors be it in their capacity as directors, creditors or shareholders.

4. The statutory meeting is then held. The scheme must be approved by a majority in number and 75 percent in value of creditors and shareholders *present and voting* at the meeting in person, or by proxy.

Secured and unsecured creditors vote separately in different polls. Contingent creditors are entitled to vote.[6]

Separate classes of share vote in separate polls.

If the scheme is approved by each different poll, then the scheme is put to the High Court for approval.

5. The High Court is petitioned under s 205 for approval to carry out the scheme. Following *Re C M Banks Ltd*,[7] the Court will give approval if:

- the statutory provisions in ss 205 and 206 have been followed
- information concerning the scheme has been fairly put to those attending the meeting
- each class of creditor and shareholder was fairly represented

at the meeting
- the scheme is such that an intelligent honest man of business would reasonably approve. This is an objective test. The Court is required to take into account that the scheme has some commercial merit.

Consequences of High Court approval

1. A copy of the Court Order approving the scheme is registered with the Registrar of Companies. The scheme is not effective until registered.[8]

2. Dissident creditors are bound to the scheme.

3. Dissident shareholders are similarly bound. Dissenting minority shareholders can demand to be bought out in cash, rather than receiving shares, if the scheme involves a takeover followed by the liquidation of the target company.[9]

1 Sections 70 and 75 provide an alternative method of achieving an alteration and reduction of share capital.
2 See Weinberg on *Takeovers and Mergers* (1979), para 620.
3 Discussed by Paul Darvell in the *Company Director & Professional Administrator*, November 1982, p 40.
4 *Re Stewart & Sullivan Farms Ltd* [1981] 1 NZLR 712, 721.
5 Ibid, 718.
6 *Re Harry Thomson Ltd* (High Court, Auckland. 3 November 1981. (M 748/81)).
7 [1944] NZLR 248.
8 Section 205(3).
9 Section 278(3).

Current cost accounting and the law

Robert Wilson

THE October publication of this Journal contained an edited transcript of a television programme on current cost accounting (CCA). The adoption of this change to accounting practice means, for accountants, a departure from a system of historic cost employed for centuries. The purpose of this note is to explain further the significant features of current cost accounting. It is necessary for those lawyers who deal with company financial statements to understand the proposed change in accounting practice, to master the underlying concepts in a general way and to introduce into their lexicon such phrases as cost of sales adjustments, (COSA).

Introduction

There is no law in New Zealand which prescribes the use of any particular accounting method. The Companies Act 1955 imposes both a general standard and sets specific requirements relating to company financial statements. The general standard set is that accounts must represent a "true and fair view" of the financial affairs. The specific requirements as to disclosure are those set out in the Eighth Schedule to the Act.

The Council of the New Zealand Society of Accountants in Current Cost Standard No 1 (CCA-1), seeks to mandate CCA in the form of supplementary accounts published by companies. This position has been reached some years after a report on inflation accounting was presented and after considerable further investigation and research on CCA has been carried out.

What is CCA?

A system of current cost accounting seeks to preserve the productive capacity of the business, to maintain those assets that produce the profit. It is also a method of accounting designed to improve the quality of the reported profit figure. The CCA system outlined in the Society of Accountants standard CCA-1 introduces a concept of capital represented by the net operating assets of the business. The CCA system is concerned with business operating capability, the historic cost system is concerned with money capital maintenance. When it is recognised that money is merely an elastic measuring device of value then the weakness of the historic cost system in periods of severe price movement can be appreciated.

The Richardson Committee

The Committee of Inquiry into Inflation Accounting (Richardson Committee 1976) recommended the adoption of a system of current cost accounting. The essential features of such a system envisaged by that committee were:

- assets should be valued at current cost to the enterprise as a continuing entity
- the operating profit of the enterprise should be derived by recovering the current cost of resources consumed to produce that revenue
- a figure designated as "profit attributable to the owners" should be presented which reflects the position of the increment in the capital maintenance reserve financed from borrowings.

To derive the current cost operating profit of the enterprise three adjustments would be necessary in most cases:

- Depreciation expenses would be based on the current cost of related assets at the end of the period.
- Inventory would be valued at current cost to the enterprise at year end and a cost of sales adjustment is made to charge the revenue for the current cost, at the time of sale, of the items sold.
- An adjustment should be made to reflect the change in the value of circulating monetary assets. Such assets include cash, bank deposits and trade accounts receivable. These assets are employed in the ordinary course of business and cannot be removed from operations without impairing the productive capacity of the enterprise.

Interest on borrowed funds was to be excluded as a deduction in arriving at the current cost operating profit of the enterprise.

The Report detailed a two profit concept, current cost profit to the enterprise and profit to the owners. To calculate the former adjustments relating to depreciation, cost of sales and circulating monetary assets are incorporated but interest on borrowed funds is excluded. To calculate the latter interest is deducted and a gearing adjustment is made. The gearing adjustment essentially increases the owner's profit thus giving recognition to the fact that the corresponding credits to the capital maintenance reserve were partly financed from borrowings.

CCA-1

This standard provides for current cost information to be included in annual financial statements in addition to historical cost information, with respect to public companies. The concept of capital adopted by the standard is one represented by the net operating assets of the business, ie, physical capital. These assets are the same as those included in historic cost accounts but in CCA accounts fixed assets and inventory are expressed at current cost.

This method, detailed as the preferred method, adopts the two profit concept based on an operating capability concept of capital. It is however, worth noting that the standard records that consensus has not been reached on the concept of capital to be adopted, profit measurement depending on concept of capital applied. CCA-1 does allow an alternative method of capital maintenance viz financial capital ie, based on general or consumer purchasing power. The Accounting Research and Standards Board, New Society of Accountants has issued guidance notes in respect of both preferred and alternative methods.

Implications for the law

Mr G Valentine in the television programme noted:

> Best accounting practices have been years ahead of the law in the last hundred years and this position still obtains.

The statement is well founded representing the hands of attitude illustrated in this reference:

> There is nothing at all in the Act about how dividends are to be paid, nor how profits are to be reckoned; all that is left and very judiciously and properly left, to the commercial world. It is not a subject for an Act of Parliament to say how accounts are to be kept; what is to be put into a capital account, what into an income account is left to men of business. (per Lindley LJ, *Lee v Neuchatel Asphalte Co* (1889) 41 Chd 1).

The law in New Zealand regarding distributable profits is unsatisfactory. There is no directive as to what in this country represents distributable profits as is contained in recent United Kingdom legislation.

CCA profit will be determined after making various charges against revenue to provide for capital maintenance. The profit measured will depend on the concept of capital applied. CCA supplies for the law's consideration two concepts of capital and a realistic notion of profit.

Possession of minute quantities of controlled drugs — An anomaly in the United Kingdom

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THE Misuse of Drugs Act 1971 (c38) made new provisions in the United Kingdom with respect to "dangerous or otherwise harmful drugs". Amongst these provisions, the Act contained in s 5 two offences concerned with possession. Section 5(1) provided that "it shall not be lawful for a person to have a controlled drug in his possession" and this was supplemented with the two offences; by s 5(2) it is an offence for a person to have a controlled drug in his possession in contravention of s 5(1), and by s 5(3) it is an offence for a person to have a controlled drug in his possession, whether lawfully or not, with intent to supply it to another. The Act, it will be noted, does not provide for a minimum quantity that an accused person must possess in order to fall within the terms of the section and accordingly the Courts have developed certain tests in relation to the point. However, it now appears that the test applied by the Courts in England and Wales, and Northern Ireland differs from the tests applied by the Courts in Scotland. That a common statute should be applied by the use of different tests in the separate jurisdiction of the United Kingdom is a matter of public concern and this was reflected in the subject being raised in the House of Commons by way of a question to the Solicitor-General for Scotland. Since then the development of case law would appear to have gone some way to resolving the differences but whether the problem has been solved, it is submitted, is open to doubt. How did these circumstances arise?

English law

For some considerable time the leading case on the possession of minute quantities of controlled drugs was *R v Carver* [1978] 3 All ER 60 which was the authority for a test of usability. The Crown case included forensic evidence that a scientific test showed that the accused was in possession of not less than 20 microgrammes of cannabis resin and the discovery of scrapings aggregating 2 milligrammes of cannabis resin. The accused was convicted and appealed. The first ground was that the quantities were so minute that common sense would equate them with nothing. The Court of Appeal allowed the appeal on this point in respect of the 20 microgrammes and Michael Davies J held (at p 62) that "probably the 20 microgrammes ought to be regarded as amounting to nothing". As the 2 milligrammes were, according to the forensic scientist, about the size of two pinheads, the common sense test could not equate this with nothing. The second ground of appeal was that as the mischief which the statute is intended to strike out is the use of dangerous drugs, possession of a quantity too small to be used ought to be ignored. This ground of appeal was accepted by the Court (at p 63). "So far as the 2 milligrammes are concerned, and a fortiori the 20 microgrammes, on the evidence (of the forensic scientist) these quantities were too small to be usable for any purpose which the statute was intended to prohibit."

The test of usability was further

developed in *R v Webb* [1979] Crim LR 4-63 and *Tarpy v Rickhard* [1980] Crim LR 375 and welcomed by some commentators: see C Manchester, "Dangerous Drugs and De Minimis", 95, LQR 31 and A N Khan, "Cannabis De Minimis", (143) JPN 102.

Scots law

The only relevant authority in Scots law is *Keane v Gallacher* [1980] SLT 144 where the accused was found to be in possession of a small quantity of a resinous substance being cannabis resin weighing not less than 1 milligramme and also cannabis resin weighing 10 milligrammes. In submissions, the defence solicitor argued inter alia that the Crown had failed to prove that the quantity of cannabis resin found in the possession of the accused was "usable" and cited *R v Carver*. The learned Sheriff acknowledged that he was not bound by English authorities but nevertheless chose to follow it and the accused was acquitted. The Crown appealed to the High Court of Justiciary and there the Court took the view that the answer to the problem should be found in the terms of the Act: if it is established that an accused person was, without legal authority, in possession of material and that material was a controlled drug then a conviction for a contravention of s 5(1) of the 1971 Act should follow. In the opinion of the Court (at p 147):

> The decision in *R v Carver* seems to entail the importation into s 5(1) of a qualification to the term "controlled drug" namely "which is being used". If that be the case, it would add an additional onus on the prosecution to prove that fact. If Parliament had intended that such a qualification should be added it would have been simple to give express effect to it. . . . The plain meaning of [s 5(1)] makes "identification in an acceptable manner" and not "capable of being used" the test, and there does not appear to us any absurdity in that.

In distinguishing the English authorities the Court was of the view that "the fact that the Crown failed to prove that the quantity of cannabis resin found in the respondent's possession could be used for a purpose struck at by the Act is an irrelevant consideration."

English law again

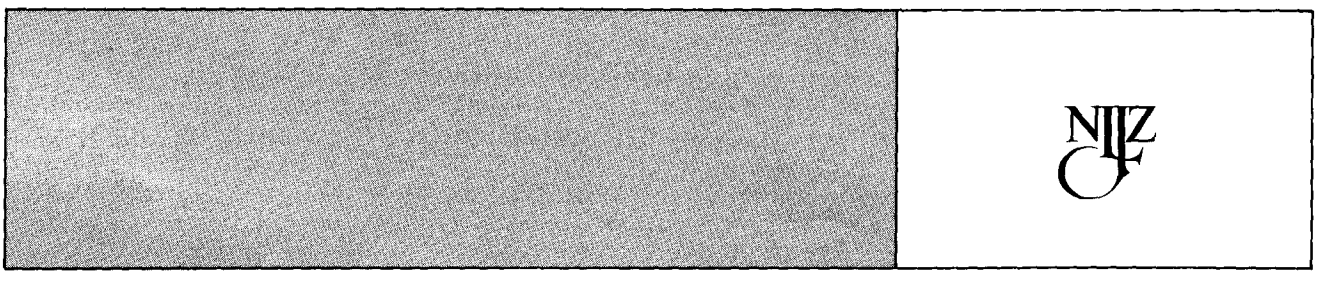
The House of Lords was recently given the opportunity to consider the matter with the Crown appeal *R v Boyesen* [1982] 2 WLR 882. The point of law for the House to consider was "whether the offence of possession of a controlled drug contrary to s 5(2) of the Misuse of Drugs Act 1971 is only proved if the quantity of the drug detected is capable of use". This point was answered in the negative by Lord Scarman with whose speech the remaining Judges agreed. The noble Lord said (at p 888) that he was "entirely persuaded" by the reasoning in *Keane v Gallacher* and that it is possession of controlled drugs that was being struck at by the statute, not the use or potential use of these drugs. In rejecting the test of usability Lord Scarman held that "the view that possession is only serious enough, as a matter of legal policy, to rank as an offence if the quantity possessed is itself capable of being misused is a highly dubious one. Small quantities can be accumulated". In its place Lord Scarman held (at p 888) that it "is a perfectly sensible view that possession of any quantity which is visible, tangible, measurable and 'capable of manipulation' is a serious matter to be prohibited if the law is to be effective against trafficking in dangerous drugs and their misuse".

Conclusion

For the possession of minute quantities of controlled drugs in Scotland the Courts on the authority of *Keane v Gallacher* will apply the test of identification in an acceptable manner to decide whether the quantity in issue is to be recognised in law. In England the Courts must apply the test of visibility, tangibility, measurability and "capability of manipulation" on the authority of *R v Boyesen*. The latter case was an encouraging step in the direction of reconciling what had been in fact very different tests. But can that process be said to have been completed? The essence of the Scots authority is identification in an acceptable manner, a test that Lord Scarman described as implicit in the terms of the statute. The essence of the English authority is measurability, tangibility, visibility and capability of manipulation. Can these qualities be said to be implicit in the terms of the statute? The last heading was a phrase used at the trial by the forensic scientist who gave evidence of having examined the traces of brown substance: *R v Boyesen* at p 885 and 888. And further, the test of usability founded in *R v Carver* (per Michael Davies J at pp 477-8) was disapproved of in *R v Boyesen* at p 888 on the grounds that there was no reference in the statute to "usability". There is no reference either to measurability, tangibility, visibility or capability of manipulation.

The essential difference, it is submitted, between the Scots and English tests appears to be this: in Scotland the Courts appear to be concerned with the veracity of the process by which the substance at issue is identified and that if that substance is identified in an acceptable manner, whatever that may be, then quantity de facto is irrelevant, whereas in England the Courts appear to be concerned not to convict an accused person unless and until the quantity of the substance is tangible, measurable, visible and capable of manipulation, and that this test implies that quantity de facto is relevant.

It remains to be seen, of course, what the Courts will make of these two tests and whether or not there will be any great difference in their practical application but, it is submitted, that the point cannot yet be said to be as settled as some commentators have suggested: A N Khan, "Possession of Microscopic Quantity of Controlled Drugs", 146 JPN 356.



"Solicitor's approval" clauses

S Dukeson LLM (Hons)

IT is proposed to discuss a number of issues relating to "solicitor's approval" clauses, not all of which, it is suggested, have been adequately discussed previously. The first is the obligation to act in "good faith" which is said to rest both upon a party submitting a contract to his solicitor for approval and upon his solicitor. The second concerns the matters to which the approval relates. The third is the difficulty in having a "solicitor's approval" clause operate as a precontractual condition precedent.

The question of good faith

It is elementary that, in the absence of a binding contract, a party to an agreement may resile from that agreement without liability.[1] As there is no contract, there is no basis upon which an obligation to co-operate can be imposed upon either party and the common law of contracts does not acknowledge a duty to negotiate contracts in good faith. In the present context, therefore, if the condition were precontractual there could be no obligation upon a party to submit an agreement to his solicitor for approval,[2] and there could be no limits on the matters which his solicitor might consider if the agreement were submitted for approval. The position is different if a contract exists.[3] To allow a party to instruct his solicitor to disapprove the contract and then plead the failure of the condition would be to make the contract illusory. Accordingly, as an extension of the obligation to co-operate which is implied into most synallagmatic contracts, it is suggested that a promise is to be implied by that party to submit the contract to his solicitor for independent advice,[4] ie to consult him "in good faith", eg *Marten v Whale* [1917] 2 KB 480, 486-487 per Scrutton LJ; 487 per Bray J; *Smallman v Smallman* [1972] Fam 25, 31-32 per Denning LJ. (Instructing the solicitor to disapprove the contract would constitute an anticipatory repudiation.) This implied obligation is reinforced by the default principle which was discussed in *New Zealand Shipping Co v Societe des Ateliers et Chantiers de France* [1919] AC1, and which prevents a party taking advantage of his own wrong, eg by instructing his solicitor to disapprove the contract.

However, the English cases require that the solicitor also act in "good faith", and some require that he act reasonably,[5] though these requirements were equated by Farwell J in *Caney v Leith*:[6]

> In my judgment . . . [unreasonableness deals] with a position where the solicitors are not acting in good faith — that is to say, where to assist their client, and get him out of the contract, or for some other reason, the solicitors refuse to approve the [contract], without giving the matter any consideration at all, or where their reasons for disapproval are so patent and absurd that the Court can say in a moment: "This is ridiculous and the solicitors cannot possibly make any such objection as that".

With respect, these pronouncements are misleading. In discussing the notion of "good faith" (which is not a recognised contractual principle as such) the focus should be upon the party who is to submit the contract for approval and not upon his solicitor. It surely cannot be doubted that if the solicitor's client instructs him to disapprove the contract, the solicitor must obey those instructions,[7] though he should also advise his client of the consequences. While the client will have committed a breach of his (implied) obligation (to submit the contract to his solicitor for independent advice), and will not be able to rely on the condition to resile from the contract, the solicitor, who owes no duty to the other contracting party, has merely acted in accordance with his client's mandate.[8]

As a matter of principle therefore, it is submitted that Blanchard is incorrect when he writes that the solicitor[9]

> must give his approval unless he genuinely finds a conveyancing problem in the agreement [and] cannot simply do what his client instructs.

It is also submitted that Coote is incorrect when he writes that:[10]

> [If] any contract is to be formed in advance of the solicitor's approval, there must be some constraints upon the exercise of his discretion. If he were to be free to act solely on his client's instructions there could be no immediate contract because the client would have undertaken no present obligation, unless it be just to communicate with his solicitor. More must have been intended than that.

The client has in fact undertaken two obligations. First, he has promised to purchase if his solicitor approves the contract. This promise gives rise to a conditional obligation. Secondly, he has (impliedly) promised to submit the contract to his solicitor for independent advice. This obligation is absolute. The client by instructing his solicitor to disapprove the contract commits a breach of the implied promise. To prevent him from resiling from the contract upon the assertion that the condition has failed, the principle discussed in the *New Zealand Shipping Company* case will be applied, ie he will be prevented (estopped) from taking advantage of his own wrong. In view of the difficulties that may be involved in proving that the client has instructed his solicitor to disapprove the contract, it may be that, in some circumstances at least, it would be easier to keep the contract on foot by simply asserting that, from an objective point of view, the contract has been disapproved for a bad reason — see post.

The practical consequence of this view of the operation of a solicitor's approval clause is that a solicitor may feel free to follow the instructions of his client. His duty is to advise his client's actions in instructing him to disapprove the contract without good reason will constitute a breach of contract. It is submitted that this view is also of value because it provides a more correct conceptual analysis of the operation of a solicitor's approval clause.

Matters to which the approval relates

Although, it is suggested, it is the client and not the solicitor who has a duty to

act "in good faith", (the solicitor would presumably act in "good faith" in any case) the solicitor nevertheless has a finite range of matters which are appropriate for his consideration in deciding whether or not to approve the contract. The point being that a solicitor may act in good faith but exceed the matters which he may legitimately take into account in deciding whether to approve the contract. In this respect, it is submitted that Coote is correct in writing that,[11] "The exact limits must . . . be a matter of interpretation in each case."

Generally, if not universally, "solicitor's approval" clauses in New Zealand have not been restricted to matters of form or title, but have been widely expressed.[12] A typical formulation, therefore, would be "subject to my solicitor's approval". In *Boote v R T Shiels & Co Ltd* [1978] 1 NZLR 445 Cooke J said, at p 451 that such a clause "[is] meant to ensure that the conveyancing aspects of the transaction [are] satisfactory from the purchaser's point of view."

It would seem that real estate agents and most conveyancers regarded such a clause as an "all purpose" protection clause, intended to give the approving solicitor a wide range of circumstances to consider in determining whether or not to approve the contract, including the appropriateness of the bargain itself.[13] Indeed, this was the view taken by Holland J at first instance in the *Provost Developments Ltd* case. Accordingly, his Honour would have allowed the vendor to resile from the contract even though his solicitor's disapproval, largely stemmed from the fact that the vendor had received a higher offer.

Not surprisingly, the Court of Appeal rejected Holland J's interpretation.[14] Such an interpretation made nonsense of the contract, rendering the vendor's obligations and the purchaser's rights illusory.[15] As Coote has written, where a binding contract (as opposed to mere agreement) is involved, there is no reason why the solicitor should have reference beyond conveyancing matters.[16] This statement must be accepted, provided that matters of conveyance are taken to include matters of form. Richardson J considered form to be a matter of conveyance in *Provost Developments Ltd v Collingwood Towers Ltd* [1980] 2 NZLR 205, 214 (CA), and clearly form can have an important bearing upon the transaction. Most solicitors will have received agreements which are difficult or impossible to transact in view of the draftmanship of the agent involved.

Whether the solicitor has considered matters which he should not have in disapproving the contract will generally be determined objectively.[17] If he has the Court will not permit his client to avoid the contract on the basis of the disapproval. However, as there is no duty on the solicitor to act "in good faith", and as the client has not instructed the solicitor to disapprove, a rationale for this restriction must be found. It is submitted that the position can only be justified doctrinely upon the basis that it cannot have been the presumed intention of the parties, at the time of contracting, that the contract could be avoided if it was disapproved for an objectively bad reason.

The preceding analysis demonstrates that, when considering the operation of a solicitor's approval clause, the hardest issue to resolve is not whether a solicitor is entitled to follow the instructions of his client, but to determine what matters are appropriate for his consideration when deciding whether or not to approve the contract. Reference has already been made to matters of conveyance and matters of form.

However, it will not always be easy to determine whether a solicitor is entitled to consider a particular matter, as these labels are descriptive, not analytical. For example, is a solicitor entitled to refuse to approve a contract because it does not record an essential part of the agreement reached between the parties? While most solicitors would, no doubt, consider that this would be an appropriate case for disapproval (until the matter was resolved), it is not easy to classify the situation as a matter of conveyance or form; it appears to be a matter which should be referred to a Court of equity for rectification. The point is that all problems are not solved by formulating a general principle which is merely a description of the sum total of its parts.

The question of contract

It follows from the previous discussion that, if a client intends to make his agreement subject to the approval of his solicitor in all respects, he should make it clear that he does not sign the agreement with an intent to contract. However, difficulties exist in ensuring that a "solicitor's approval" clause operates as a precontractual condition precedent.

First, it is difficult in practice, at least in Auckland, to have a "solicitor's approval" clause inserted into an agreement at all. This difficulty appears to stem from a directive from the Real Estate Institute of New Zealand, based upon a recommendation from the Auckland District Law Society, to the effect that agents should not incorporate such clauses into agreements.[18] Many practitioners appear unaware of this ban and it is difficult to understand or accept the policy behind it. The importance of a "solicitor's approval" clause lies mainly in the opportunity it gives to the solicitor to ensure that the agents concerned have included all the necessary provisions to effect the bargain between the parties and that the draftmanship of the agent is appropriate to the task. In view of the state of *some* agreements which are drafted or completed by *some* agents, the solicitor's approval clause can still perform a useful function even though some constraints upon its operation may be imposed.

Secondly, real estate agents have in the past regarded "solicitor's approval" clauses as giving the party for whose benefit they were inserted unlimited protection, by removing all constraints on the matters which that party's solicitor could consider in determining whether to approve the contract. Accordingly, agents would not have been reluctant in advising a prospective contracting party that he could sign the contract but resile should his solicitor disapprove the contract for any reason. In essence this belief or attitude was a manifestation of the failure by agents to distinguish between precontractual and contractual relationships. In view of the *Provost Developments* case particularly, this belief can no longer reasonably be held.

Thirdly, in the *Provost Developments* case Cooke J in particular considered (ibid p 209) that most people would intend such a clause to operate as a contractual, rather than as precontractual, condition precedent. Amongst the factors considered by the Court to indicate a contractual condition precedent in the case were that the agreement was made subject to the approval of a solicitor and not some general adviser, and that the agreement was contained in a standard form.

It must be admitted that determining the intention of the parties can be a task fraught with difficulties. There may be a conflict between the presumed or objective intention of the

parties and their actual or subjective intention. In the present context for example, it may be that most parties, even though intending to contract, believe that a solicitor's approval clause gives them freedom to instruct their solicitor without legal consequence. In such a case the Court, having found an intention to contract, must substitute an objective intention for the subjective intention of the parties with respect to the operation of the solicitor's approval clause, and this entails placing some limit upon the operation of the clause. Otherwise, one party is given the sanctity of contract and at the same time the right to resile from it at will.

However, the factors mentioned above in the *Provost Developments* case by Cooke J are not free from difficulty. It is difficult to conceive, particularly in view of the wide role of the modern lawyer, to what other adviser the agreement would be submitted for approval. Further, the fact that a standard form agreement is used is, so far as the parties themselves are concerned, largely accidental.[19] The essential point is to determine what is usually intended when an agreement is made subject to solicitor's approval. If it is usually intended that the solicitor is to be able to advise on all aspects of the transaction, then it can be argued that the *presumed* intention should be that no contract is intended until approval has been given. The converse would be true if the usual intention is that the solicitor is to have a more limited role in approving or disapproving the agreement. The difficulty in determining what is usually intended by the inclusion of a solicitor's approval clause is the doctrinal insistence that the intention of contracting parties is to be determined objectively. Accordingly, the execution of a standard form agreement by both parties to the transaction will suggest the fact of contract and a more limited role for the solicitor's approval clause. Certain presumptions will arise which may require the Court to substitute an objective intention for the subjective intention of the parties.[20] However, these presumptions in favour of contract should be capable of displacement in appropriate circumstances, particularly when it is realised that the parties do not control the form of their agreement and that they may agree without contracting.

As can be seen from the preceeding analysis, where a standard form agreement is used the inclusion of a "solicitor's approval" clause is highly unlikely to be construed as a precontractual condition precedent. If the condition is held to be contractual, there will inevitably be restrictions, first upon the client, who will have an implied obligation to submit the contract to his solicitor for independent advice, and secondly upon the solicitor, who will have a limited range of circumstances to consider in determining whether to approve the contract.

Summary

The primary purpose of this article is to suggest a more correct conceptual analysis of the operation of solicitor's approval clauses. It is submitted that the authorities have erred in stating that, where a contract exists, a solicitor is not entitled to follow the instructions of his client to disapprove the contract. However, it is proper to place limits upon the operation of a contractual condition.

1 Cf *Anglia T V v Reed* [1972] 1 QB 60. There is the possibility of an action in quasi contract. In this respect, contrast *Sabemo Pty Ltd v North Sydney Municipal Council* [1977] 2 NSWLR 880 (noted by the writer in [1979] Auckland University LR 467) with the views of Mahon J in *Avondale Printers and Stationers Limited v Haggie* [1979] 2 NZLR 124.

2 As can be seen from *Buhrer v Tweedie* [1973] 1 NZLR 517, and *Frampton v McCully* [1976] 1 NZLR 270 (CA).

3 This will normally be the position in the vendor and purchaser context where the revised form of Agreement for Sale and Purchase approved by the Auckland District Law Society is used, because that form of agreement is expressly stipulated to be a binding contract upon its execution by both parties. Clear wording will have to be used if the parties intend a "solicitor's approval" clause to operate as a precontractual condition precedent.

4 Just as a promise is to be implied on behalf of a purchaser under a binding contract to use reasonable endeavours to raise finance where a finance condition is inserted into the contract.

5 *Hudson v Buck* (1877) 2 Ch D 683; *Clack v Wood* (1882) 9 QBD 276.

6 [1937] 2 All ER 532, 538. The New Zealand Courts have required the solicitor not to act "capriciously" — see *Boote v R T Shiels & Co Ltd* [1978] NZLR 445, 451 per Cooke J; *Provost Developments Ltd v Collingwood Towers Ltd* [1980] 2 NZLR 205, 208 per Woodhouse J; and 214 per Richardson J.

7 Cf Blanchard, *op cit* (2nd ed), para 1217 p 121; Coote, op cit [1978] NZLJ 170 (though see his note in [1980] NZLJ 430, 431); McMorland, "A New Approach to Precedent and Subsequent Conditions" [1980] Otago LR 449, 457.

8 Cf Scrutton LJ in *Marten v Whale* [1917] 2 KB 480, 486-487, who said, "There is an implied provision that the plaintiff shall appoint a solicitor and shall consult him in good faith, and that the solicitor should give his honest opinion." See also Bray J ibid p 487.

9 Op cit (2nd Ed), para 1218, p 121.

10 Op cit [1980] NZLJ 78.

11 Op cit [1976] NZLJ 40, 42.

12 See for example the clauses litigated in *Boote v R T Shiels & Co Ltd* [1978] 1 NZLR 445 (CA) and in *Provost Developments Ltd v Collingwood Towers Ltd* [1980] 2 NZLR 205 (CA).

13 See Blanchard, op cit para 1217, p 119.

14 [1980] 2 NZLR 205, 209 per Woodhouse J; 211 per Cooke J; 213-214 per Richardson J.

15 See Coote, *op cit*, [1980] NZLJ 78, 79; *Provost Developments Ltd v Collingwood Towers Ltd* [1980] 2 NZLR 205, 209 per Woodhouse J; 211 per Cooke J; 213 per Richardson J. It is submitted that this does not mean, however, that the solicitor could not accept his client's instructions. It only means that his client, by instructing him to disapprove the contract, commits a breach of the implied obligation to submit the contract to his solicitor for independent advice.

16 Op cit [1980] NZLJ 170, 171; though see post cf Blanchard, op cit (1st ed) para 1216, p 103.

17 *Caney v Leith* [1937] 2 All ER 532, 538 per Farwell J; *Provost Developments Ltd v Collingwood Towers Ltd* [1980] 2 NZLR 205, 214 per Richardson J (although the solicitor in *Provost* did in fact give evidence). See Coote, op cit [1981] NZLJ 325, 328.

18 The solicitor is not usually consulted before the agreement has been signed. However, if he has the good fortune to be involved before that time, and the agent refuses to insert an approval clause into the agreement, one solution is to require the agent to deliver the agreement to the solicitor for his perusal before execution.

19 See Coote, op cit [1981] NZLJ 325, 326.

20 For example, the Agreement for Sale and Purchase is expressly stipulated to be a binding contract. Where a standard form agreement is not used, the presumptions in favour of a contract are lessened. Coote, op cit [1980] NZLJ 430, 432; Jenkinson [1980] NZLJ 296.

Discovery of documents in civil litigation: the duties of solicitor and counsel — Part II

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This concludes the author's learned article, the first part which was published in November.

The impact of The Harman case

THE case *Harman v Secretary of State for the Home Department* [1982] 2 WLR 338, involved an appeal against the conviction for contempt of a solicitor who was legal officer of the National Council for Civil Liberties and who was acting for a plaintiff (one Williams) in an action against the Home Office arising out of the plaintiff's treatment in prison in an experimental "control unit". During the course of the proceedings the plaintiff's solicitor (Miss Harman) obtained upon discovery a number of confidential documents from the Home Office. In view of a concern at possible misuse of the documents, the Home Office wrote to the solicitor stating that it did not wish the documents to be used for the general purposes of the National Council for Civil Liberties. The solicitor replied stating that she was well aware of the rule that documents obtained on discovery should not be used for any purposes other than for the case itself. The contents of the documents were subsequently read out in Court by counsel for the plaintiff. After the trial Miss Harman allowed a journalist to have access to the documents that had been read out in Court to assist him in writing a newspaper article about the experimental control unit, in the course of which comments highly critical of the Home Office ministers and civil servants were made.

The Home Office applied for an order against Miss Harman for contempt of Court on the grounds that she had breached the implied undertaking not to use documents obtained on discovery for purposes other than those of the action in which they were disclosed. The House of Lords held by a majority of 3 to 2 that the solicitor's conduct was a contempt of Court and that a solicitor who in the course of discovery obtained documents from a client's opponent gave an implied undertaking to the Court not to use the copies, nor to allow them to be used for any purpose other than the proper conduct of the action on behalf of his client. It was further held that the fact that the documents had been read out in open Court at the hearing did not bring the implied undertaking to an end.

Lord Diplock referred to the test of "collateral or ulterior purpose" and (at p 343) observed:

> I do not use it in a pejorative sense, but merely to indicate some purpose different from that which was the only reason why, under a procedure designed to achieve justice in civil actions, she was accorded the advantage, which she would not otherwise have had, of having in her possession copies of other people's documents.

The issue which the House of Lords had to determine was whether it was the duty of the solicitor of one party in civil litigation, who has obtained possession of copies of documents belonging to the other party, to refrain from using the advantage enjoyed by virtue of such possession for some collateral or ulterior purpose of his own not reasonably necessary for the proper conduct of the action on his client's behalf. If so, is a breach of that duty a contempt of Court? Lord Diplock had earlier noted (at p 341) that the case was "*not* about freedom of speech, freedom of the press, openness of justice or documents coming into 'the public domain'." He added that: "The case, in my view, turns on its own particular facts, which are very special."

The majority answered both questions in the affirmative. The appellant argued that the duty not to disclose discovered documents subsisted only up to the moment that the documents were actually read out aloud in Court and that, upon being so read out the documents entered "the public domain" and could be used by anyone (including a solicitor who had obtained copies on discovery) for any purpose he fancies. Lord Diplock disagreed. He stated at pp 345-346 that:

> [I]t is, in my view, beyond question that anyone who had in his or her possession the two bundles that had been prepared for the purposes only of the trial and obtained copies of documents belonging to the Home Office and disclosed by them in obedience to the judicial process of discovery had a great advantage over anyone who did not have access to those bundles if it was desired to use them for some collateral or ulterior purpose unconnected with the proper conduct of the action by Williams against the Home Office in which they were disclosed. This is why an order for production of documents to a solicitor on behalf of a party to civil litigation is made upon the implied undertaking given by the solicitor personally to the Court (of which he is an officer) that he himself will not use or allow the documents or copies of them to be used for any collateral or ulterior purpose of his own, his client or anyone else; and any breach of that implied undertaking is a contempt of Court by the solicitor himself. Save as respects the gravity of the contempt no distinction is to be drawn between those documents which have and those which have not been admitted in evidence; to make use for some collateral or ulterior purpose of the special advantage obtained by having possession of copies of any of an adverse party's documents obtained upon discovery is, in my view, a contempt of Court.

Finally, Lord Diplock concluded (at p 347) that:

> . . . public policy requires that the implied undertaking given by a

> solicitor to the Court, on obtaining production on discovery of documents belonging to his own client's adversary, that he will not take advantage of his possession of copies of those documents to use them or to enable others to use them for some collateral purpose, does not terminate as respects each individual document at the very moment that that document, whether admissible or not, is actually read out in Court.

Lord Roskill observed (at p 360) that this was the first time this issue had been determined in the Courts. He said that "although the obligations to which the undertaking gives rise are well known and of long standing, no one until the present case has suggested that that undertaking is susceptible of termination or qualification in the manner now urged on behalf of the appellant." His Lordship then referred to the cases dealing with the implied undertaking and noted (at p 362) that "in none of these decisions is there any suggestion of any qualification upon the scope of the undertaking other than by consent of the party whose documents have been disclosed or by leave of the Court, though it is only right to point out that in none of these cases was consideration of any possible wider qualification necessary."

Lord Roskill then (at pp 362-363) described the special advantage or privilege accruing to a party who has had discovery in civil proceedings in the following terms:

> . . . a party to whom discovery has been made is in relation to his opponent's documents at a great advantage in comparison with the rest of the world. Their owner until the moment of discovery arrives is entitled, subject only to such exceptions as a subpoena duces tecum, to absolute protection and privacy for them against all who seek them out however meritorious the motives may be of those who seek them out in the search for truth. Regret it as some may, there is no freedom of information statute in force in this country. But that absolute right is qualified once the moment for discovery in litigation has arrived. But it is only qualified as respects the other party to that litigation who thereupon acquires a privilege special to himself of seeing his opponent's documents but on terms that those documents may only be used by him or his advisers in furtherance of the litigation between them. This is a privilege or an advantage upon which our judicial process insists. Other judicial processes do not insist upon the like practice. But our judicial process insists upon this and that process involves invasion of an otherwise absolute right to privacy, albeit on strict terms in order that that privilege or advantage should not be abused.

Lord Roskill conceded that the arguments raised by the appellant were "powerful arguments", but commented that if they were to succeed they would involve an "undoubted erosion" of the rights of the party giving discovery. He considered that an acceptance of the appellant's arguments would "militate against full and frank discovery". Accordingly, he concluded (at p 366) that:

> . . . I regard it as of crucial importance that the undertaking should be maintained and not eroded. The interests of the public are amply safeguarded by the present practice. If a party wishes to use the documents read in open Court for some purpose other than the immediate purpose of the litigation, the proper course is for him to seek the consent of the owner of those documents, or conceivably, in some cases, to seek the leave of the Court. As to the last I confess that I find it difficult to think of circumstances in which the Court might be willing to give such leave in favour of a stranger and against the wishes of the owner of the documents.

The third of the majority Law Lords, Lord Keith, also referred (at p 349) to the rights of privacy of litigants and saw discovery as "a very serious invasion of the privacy and confidentiality of a litigant's affairs." Any publicity which necessarily arose from the proceedings was to be accepted as part of the "price of achieving justice". His Lordship stated (also at p 349) that:

> the fact that a certain inevitable degree of publicity has been brought about does not, in my opinion, warrant the conclusion that the door should therefore be opened to widespread dissemination of the material by the other party or his legal advisers, for any ulterior purpose whatsoever, whether altruistic or aimed at financial gain. The degree of publicity resulting from a document being read out in open Court is not necessarily very great.

Finally, Lord Keith responded to the argument that it was "quite common practice" for counsel to assist journalists in publishing accounts of legal proceedings by showing them documents so that details can be checked. His Lordship warned (at p 350) that:

> In many instances this may be of no significance and be quite unobjectionable. But there are hazards in the practice, and if there should be any reason to doubt whether the party who has disclosed the documents under discovery or his legal advisers would approve of its being shown to the journalist, it should not, in my opinion, be done without such approval.

There was only one minority speech, that of Lord Scarman, with whom Lord Simon of Glaisdale concurred. The minority placed much greater emphasis upon the interest of freedom of speech than did the majority. This fundamental difference in approach is neatly illustrated in the following passage on p 353:

> . . . we do not think that the nature and the duration of the obligation can be determined by reference merely to the requirements of the law relating to discovery of documents in civil litigation. Regard must also be had to the requirements of the general law protecting freedom of communication. A balance has to be struck between two interests of the law — on the one hand, the protection of a litigant's private right to keep his documents to himself notwithstanding his duty to disclose them to the other side in the litigation, and, on the other, the protection of the right, which the law recognises, subject to certain exceptions, as the right of every one, to speak freely, and to impart information and ideas, upon matters of public knowledge.
>
> In our view, a just balance is struck if the obligation endures only so long as the documents themselves are private and confidential. Once the litigant's private right to keep his documents to himself has been overtaken by their becoming public knowledge, we can see no reason why the undertaking given when

> they were confidential should continue to apply to them.

Lord Scarman considered that the duty of non-disclosure existed because there was something confidential to protect. Accordingly, if information or documents which were previously confidential became public knowledge, "the duty to treat them as confidential terminates." (See p 355). Therefore, the difference in view between the majority and the minority arose largely from the weighting given to the interest of freedom of speech. The greater weight given by the minority to this factor focused attention strongly on the principle of open justice (as to which see also the recent New Zealand Court of Appeal decision in *The Broadcasting Corporation of New Zealand v The Attorney General & Ors*, 11 June 1982 CA 74/82), which in turn led to diminished emphasis being given to the litigant's right of confidentiality.

To conclude this section, it may be observed that the decision of the majority in the *Harman* case has brought renewed emphasis to the special role that discovery holds in civil litigation. Moreover, any detraction from litigants' rights of privacy and confidentiality remains strictly limited and the undertakings implied upon the taking of discovery are not to be eroded. Accordingly, in cases where a stranger is seeking to obtain access to documents belonging to the litigants, the House of Lords has virtually cut off the avenue of such access through solicitors or counsel.

When will the Court authorise use of discovered documents — three recent cases

To place the principle of non-disclosure properly in context, brief reference must be made to three cases in which the Court has had to consider whether an applicant could make use of documents disclosed on discovery in earlier proceedings. The cases are: *Sony Corporation v Time Electronics* [1981] WLR 1293; *Halcon International Inc v The Shell Transport and Trading Co* [1979] RPC 97 (CA) and *United States Surgical Corporation v Hospital Products International Pty Ltd* (as yet unreported judgment of McLelland J in the Supreme Court of New South Wales Equity Division, No 2094/81, 7 May 1982).

Lord Roskill recognised in the *Harman* case that if a party wished to use documents for some purpose other than the immediate purpose of the litigation, then the proper course is to seek the consent of the owner of the documents or alternatively, seek the leave of the Court. These comments echoed the words of Bray *Law of Discovery* (1885), at p 239 that: "The principle is not that the party cannot be compelled to divulge them for any other purpose even if the Court should in any case so think fit, but that they cannot be used except under the authority of the Court." The authority cited for this proposition is *Reynolds v Godlee* (1858) 4 K & J 88; 70 ER 37.

An application of this type came before the Chancery Division of the English High Court in *Sony Corporation v Time Electronics* (supra). The plaintiffs had obtained in a passing off action an order that Time Electronics disclose the names and addresses of suppliers and produce relevant documents and deliver up certain goods. The order was subject to undertakings by the plaintiffs including an undertaking not without leave of the Court to use any document or information obtained as a result of the execution of the order except for the purpose of civil proceedings against the defendant in connection with the subject matter of the action.

When the order was served at the defendant's premises, it was found that there were not only goods of the type to which the order related, but also goods of another type also manufactured by the plaintiffs which were thought to be counterfeit. A test purchase of goods of the second type was then made by an employee of the plaintiffs' solicitors and the goods were found to be probably counterfeit. As a result of this new evidence, the plaintiffs wished to commence another action against the defendant and applied for an order similar to that obtained in the first action. At the hearing, counsel for the plaintiffs drew the attention of the Court to the rule against using material obtained on discovery otherwise in the action in which disclosure took place, without special leave of the Court.

Goulding J held that he should not refuse the plaintiffs the relief sought on this ground. He stated (at p 1295) that:

> The new action is not founded on something that the Court ordered to be disclosed in the earlier order. The real foundation of the present action is the evidence obtained on the test purchase. . . . Accordingly, for my part I think that it would be applying too strict a rule to say that this fresh cause of action cannot be pursued because of its collateral connection with disclosure ordered by the Court in the pending action.

Therefore, if subsequent proceedings are issued or contemplated and a party to earlier proceedings wishes to secure the use of documents obtained or knowledge of information gained in the course of the first action, it will be important to establish some foundation for the use of the material which is independent of the discovery process in the first action. The test purchase in the *Sony Corporation* case provides a good illustration of such independent foundation. A subpoena duces tecum to the appropriate witness or a discovery order *in the second action* would provide further examples.

Problems may arise however if in the second action there do not exist appropriate rights of discovery or the right to subpoena witnesses. A situation involving no power to order discovery or production of documents in a second action occurred in *Halcon International Inc v The Shell Transport and Trading Co* (supra). The first action had been in the English High Court while the second was in the Appeal Board of the Netherlands Patent Office. The appeal sought an order granting leave to use certain documents disclosed in the English proceedings in the Dutch proceedings. At first instance the application was refused by Whitford J.

On appeal it was held that on the assumption that the documents sought to be produced in the Dutch proceedings were not properly classed as confidential, if they were put in by the plaintiffs as evidence in the Dutch proceedings, then there was a real possibility that the defendants would be faced with an unfair dilemma concerning the use of other highly confidential documents to explain or amplify the contents of the documents produced by the plaintiffs. Thus the discretion not to allow the plaintiffs to use the documents in the Dutch proceedings had been rightly exercised.

In the Court of Appeal, Megaw LJ recognised the principle (at p 121) that: "It is open to the Court, if the Court sees fit, to give permission to a party who has obtained documents or copies of documents on discovery in an action, to use those documents for a purpose other than the purposes of the action in respect of which they have been produced." The learned Lord Justice then referred to statement of Whitford J

in the High Court as to the principles on which the Court should act in exercising its discretion. The rule had been expressed in this way (see pp 121-122):

> However, these authorities, to my mind, lead to this conclusion, that the use of a document disclosed in a proceeding in some other context, or even in another proceeding between the same parties in the same jurisdiction, is an abuse of process unless there are very strong grounds for making an exception to the general rule. It does, I think, emerge that some overriding public interest might be a good example, but not the mere furtherance of some private interest even where that private interest arises directly out of or is brought to light as a result of the discovery made.

The Court of Appeal, although upholding the exercise of the discretion by Whitford J not to grant the order sought in the motion giving permission for the documents to be used in the Dutch proceedings, was not required to decide whether the above passage represented a correct statement of the law. Megaw LJ said that he did not find it necessary in the circumstances of this case to go into the matters of principle involved. He considered that the special features of the applicable Dutch law, which did not provide for discovery or production of documents, were such that it would have been unfair in the circumstances of this case to allow the use of the documents in the Dutch proceedings.

Similarly, Waller LJ did not find it necessary to determine the correctness of the statement of the law referred to above. He adverted to the modern authorities (see the first part of this article at p) and pointed out that most of the reported cases concerned attempts by a third party to gain access to the information. The learned Judge then discussed the cases where the parties involved in the application to the use discoverable documents were the same. He stated (at p 124) that:

> Where the parties are the same and the issues are the same as in the action where discovery took place, I would not myself regard the absence of discovery procedures in the foreign country as a sufficient reason in itself for preventing the use of the documents. If that were all, it would be difficult to characterise such a use as improper but it is essential to be satisfied that such use would be fair.

Therefore, fairness *and* the legitimacy of the purpose for which the documents will be used are vital considerations upon an application of this type.

The final case in the trilogy is *United States Surgical Corporation v Hospital Products International Pty Ltd*, (supra). There, leave was sought to use for the purposes of other proceedings in the United States copies of confidential documents produced on discovery and under subpoena where the documents had subsequently been admitted as part of the evidence in open Court (compare the *Harman* case). Copies of the documents had been made and limited access had been allowed pursuant to directions of the Court and undertakings designed to preserve confidentiality.

The application for leave sought use of copies of the documents for the purposes of proceedings pending in the United States District Court brought by the plaintiff against three of the defendants in the Australian proceedings for alleged infringements of certain United States patents. In the report of the decision presently available it is not made clear whether the United States proceedings are of the

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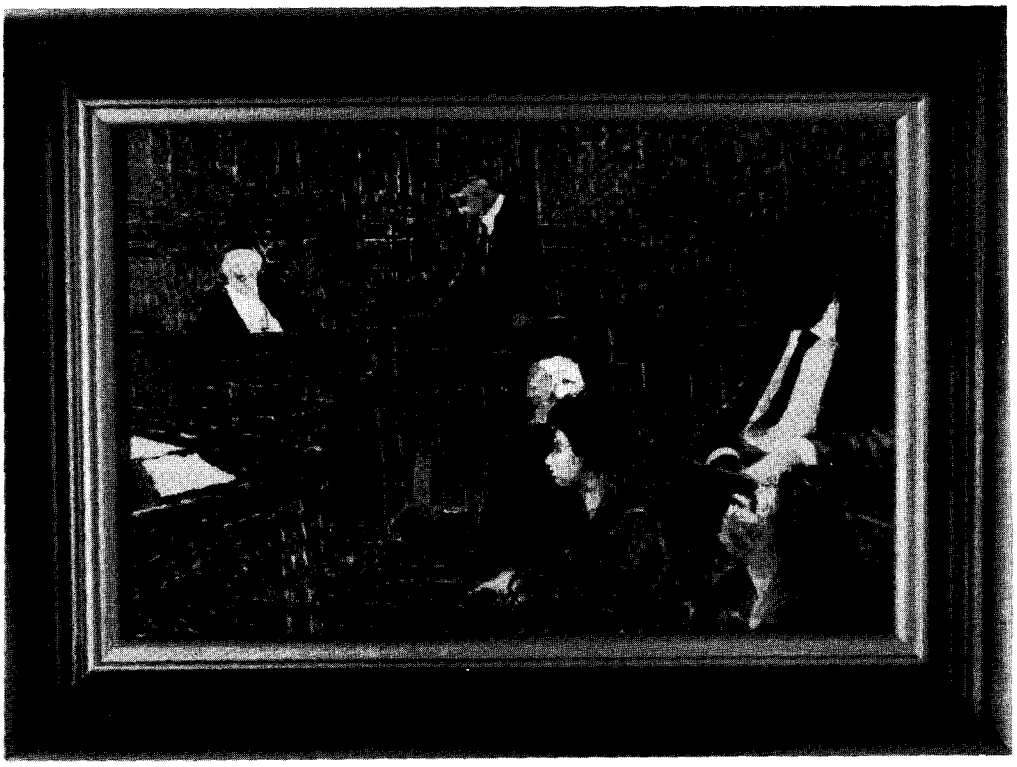

same type as those which had been before the Australian Court. Certainly, some of the defendants were the same, but the all important nature of the respective proceedings is not spelled out.

McLelland J referred in the course of his judgment to the *Harman* case and in particular to the dissenting speech of Lord Scarman. The learned Judge then stated:

> It seems to me that the Court must attempt to distinguish between the consequences of access to a document in its character as a discovered (or subpoenaed) document on the one hand, and of access to the same document in its character of document admitted into evidence on the other hand. Prima facie the Court should prevent utilisation for collateral purposes of access of the first kind and permit utilisation for legitimate collateral purposes of access of the second kind.

Applying this test, the learned Judge went on to observe that if documents had been admitted into evidence in open Court, the document could be used in other proceedings even without the leave of the Court. McLelland J stated that: "As between the parties such documents have lost their confidentiality by being admitted in evidence in open Court in the (at least notional) presence of the public and of the plaintiff, and there is every reason why in such circumstances they should be available for the purposes of the related litigation in the United States." It should be noted however, that the comments were strictly obiter and appear to be directly contrary to the dicta of the majority Law Lords in the *Harman* case. The documents the subject of the application for leave before McLelland J had not, it seems, been produced in evidence in open Court. The learned Judge referred to the *Halcon International* case and noted that it had not been suggested by the defendants that "there is any feature of any particular document in this category which would require special consideration, over and above the general claim of confidentiality." Accordingly, an order was made that the previous directions and undertakings would not preclude the plaintiff from using copies of documents disclosed in the Australian litigation in the United States proceedings.

It may well be that in the particular circumstances of this case the ruling is unexceptionable. Moreover, it is likely that the case falls squarely within the dictum of Waller LJ in the *Halcon International* case referred to above. However, with respect to the obiter dicta relating to the use of documents produced in evidence, no reasons are given for preferring the view expressed by the majority. In addition, the distinction between documents which have been "discovered or subpoenaed" and documents which have been "admitted into evidence" is one which was plainly rejected by the majority in the House of Lords. The unusual feature of the decision in the *United States Surgical Corporation* case is that the *Harman* case was not in terms distinguished by McLelland J. Accordingly, while the decision on the facts may be entirely correct, some of the statements of law in the case are clearly open to question.

Conclusion

There can be little doubt that there is in this area of the law considerable scope for further clarification of the applicable legal principles. This is particularly so with regard to the limitation upon the use of documents otherwise than in the litigation in which they are disclosed. The *Harman* case has demonstrated just how far the Courts will go by using the law of contempt to ensure that solicitors comply with the rules governing discovery of documents. But the speeches of the Law Lords give little guidance as to the parameters of the rules themselves. This is no doubt because the purpose for which the solicitor wished to use the documents was so clearly collateral or ulterior to the original proceedings.

The other recent cases discussed above show that the various public interests operating as relevant policy factors are capable of producing situations in which the interests of justice may be finely balanced. This consideration raises the question of whether there is room for legislative intervention in this area of the law. One commentator in an editorial in the *Australian Current Law Bulletin* (June 1982) after discussing the *Harman* case and the *United States Surgical Corporation* case stated:

> [These] cases illustrate perhaps the need for more clarity in the area of confidentiality and the right of the public to information. They point out perhaps the need for more rigorous and contemporary codification of the law with respect to the questions of confidentiality, breaches thereof, the benefits of open justice, the public right to information and the uses to which such can be put.

It is respectfully suggested that while the need for further clarification of the applicable principles cannot be questioned, the case for "codification of the law" is less well founded. Indeed, it is likely that legislative intervention would be an undesirable development in this area of the law. The type of issues surrounding the duties and obligations arising from the discovery process are particularly suited to control by the Courts. If the principles operating here were perceived by the Courts not to be fulfilling their required purpose then appropriate developments can be made by judicial intervention.

In conclusion, therefore, it is suggested that these important rules governing discovery of documents in civil litigation ought to be left as part of the common law which, for the past 150 years, has been developing appropriate rules to ensure that justice is achieved. Moreover, if development of the rules is required then the common law can be used for this purpose. As Lord Roskill observed in the *Harman* case (at p 360-361):

> New situations regularly arise in the practice of the law which require previously held and sometimes generally accepted views to be reviewed and if necessary to be revised in the light of that new situation. Indeed the evolution of the common law of this country to meet the changing needs of contemporary society and its adaptability to change owes much to judicial acceptance of this philosophy.

The words of Lord Donovan in the case of *Myers v Director of Public Prosecutions* [1965] AC 1001 (HL) at p 1047 are also apposite: "The common law is moulded by the Judges and it is still their province to adapt it from time to time so as to make it serve the interests of those it binds. Particularly is this so in the field of procedural law." Given this traditional flexibility of the common law, it seems preferable that it should be left to the Judges to weigh the competing public interests and relevant policy factors and if necessary clarify the existing principles and develop any new rules which may from time to time be required.