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Precedent and computers

THE traditional view of the function of a Judge in our common law based legal system is that he is not to make law but to decide cases in accordance with existing legal rules.

It is this function which sets our legal system apart from all others. An indispensable foundation of this system is the doctrine of binding precedent; a doctrine whereby certainty, precision and flexibility can be guaranteed because like cases will be decided alike, not according to general principle, as with the continental system, but according to fact, and bad law will be overruled by higher authority.

Some would argue that the system contains the seeds of its own destruction in that the vast, and ever increasing bulk of cases will in time obscure principle and the sheer bulk will result in Judges overlooking precedents in favour of once more administering the law by a system of "palm tree justice"

Two recent English decisions underline this argument but in the criticism, it may be argued lies the answer.

In the House of Lords, in *Roberts Petroleum v Bernard Kenny*, Lord Diplock, and in the Court of Appeal in *Stanley v International Harvester Co*, Sir John Donaldson, have both criticised the citation, in Court, of unreported judgments. The two Judges appear, by the timeliness of their actions, to be determined to discourage the growing resort to such decisions.

These pronouncements raise fundamental issues for our legal system.

Is an unreported judgment a precedent? A precedent is simply defined as a decision of a Court of Justice, cited in support of any proposition therein contained. Our Judges take judicial notice of the whole of our law and an individual Judge may rely upon a precedent of which he is aware even though that decision is unreported. Transcripts of judgments are recorded and provided they are reasonably accessible should be regarded as valuable precedents.

If you accept the proposition, that an accessible, though unreported judgment is a precedent, then surely to discourage their use, is to subtract from the foundations of our legal system. Or, is it that only reported decisions are valuable precedents? If that is so, then inexorably, it leads to the same conclusion, that the foundation of our legal system is being eroded. Take by way of example a rapidly changing area of law, like blood alcohol prosecutions. There is inevitably some delay between the delivery of a judgment and its official reporting — should that judgment be regarded as uncitable in a decision on a similar case arising between judgment and reporting but citable once reported?

Ours is a system of binding precedent, if a decision can be found, and it is a reliable documentation of a Judge's decision on a particular set of facts it should be regarded as much a binding precedent as a decision of a Judge reported officially.

There is a vast body of this material presently going unreported, and it would appear that because of the much larger output of our Courts we are, today, reporting a less representative proportion of case law. Perhaps it can be argued that we are living in the twilight of the common law, the twilight of a common law where the printed word is law, but not necessarily where precedent must now be overlooked.

Perhaps technology can offer a reprieve from our legal system's untimely demise. Perhaps these recent pronouncements simply serve to highlight the way we should be moving and demonstrate what a reactionary profession, we are. The use of computer information storage and retrieval means that to a large extent almost all precedents can be captured and retained, and a brain, far more logical than our own can be programmed to search and sift, and regurgitate the relevant precedents. Our Judges can continue to apply the common rule and it can continue as a system of law guaranteeing certainty, precision and flexibility. That is why the system was adopted, so why should it not live on, reinforced by an even stronger body of available precedent that is just a technological stone's throw away?

Rape study released

THE long awaited joint Justice/Department of Criminology study on rape was well worth the wait. It is deserving of close and careful scrutiny by all members of this profession.

The study released late last month is concerned to clarify the "complex and multi-faceted issues" involved.

It brings together the issues in need of discussion, not merely promoting a wholesale reform of the substantive law but drawing together all the threads, and presenting them in a thoughtful way, providing an ideal discussion base.

With a specific aim to consider the situation and its reform from the point of view of the rape victim the study initially sets out some stark new facts.

Rape is one of the most under-reported crimes — it is suggested that it may be as low as one in five cases ever come to the notice of the authorities. These low figures are carried through the whole prosecution procedure yielding the startling result that a rapist's chances of ever being caught and convicted may run as low as four percent.

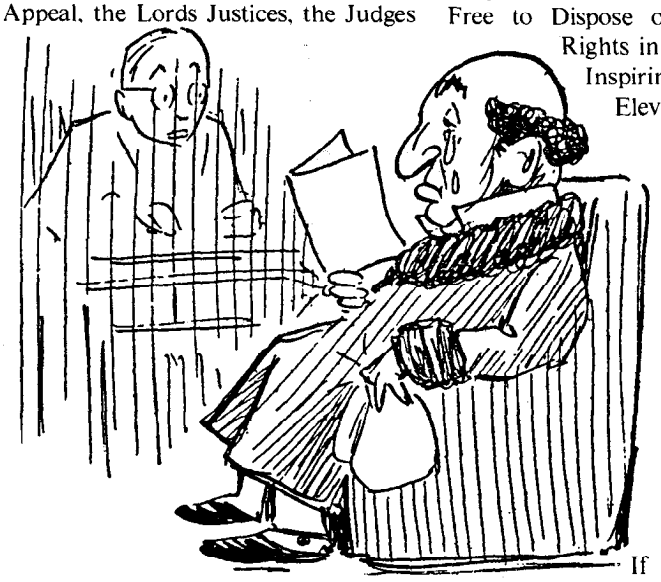
From the reform side the study is not overly supportive of adopting the overseas experience in our own review. It suggests that on the whole the grading of sexual assaults has been unsuccessful and the study tends more to favour the retention of the definition of rape and indeed its very name. The study sees no reason however why a man should be protected from prosecution for rape because he is in a marital situation.

Rape is a crime without compare in our criminal law, it stands out as the ultimate in human degradation. This study brings together the issues, and explodes some of the myths. If it does no more than provide a basis for reasoned discussion it will have fulfilled its purpose. We now have the vehicle to enable wide public debate and it is incumbent upon us to see that we are involved in that debate. We should read and digest this report and then respond, we have an opportunity for reform, and an ideal discussion paper to work from.

Martin Fine

Mr Bluebag, Mr Bert Baumstein and "The Old Judge"

Mr Bluebag having Ample Leisure after his Call to the Bar Took to Visiting the Pictures. Sickened by the Foolishness of the Plots Unfolded before him, Mr Bluebag Took Pen in Hand to See whether he could Emulate the Imbecility of their Authors. The Result was excellent. Mr Bluebag's Film Began with the Old Judge, Fully Robed, Returning on Christmas Eve to his Chambers in Pump Court, after a Hard Day's Work. It was Snowing. to the Old Judge's Amazement he Found a Newly-Born Infant (Female) on the Doorstep. Wrapping the Infant Tenderly in his Full-Bottomed Wig, the Old Judge Carried her to the Fire-Side, where, with the Help of his Old Clerk (with White Hair), he Bathed and Fed her. As the Infant had Brought a New Joy into his Life — for he was Lonely — he Adopted her. When a Beautiful Young Woman of Eighteen the Infant Produced a Sealed Letter which she had Always Worn Round her Neck. It informed the Old Judge that she was the Child of his Son, who had been Shipped in Disgrace to the Antipodes and Never Heard of Again. On the Nineteenth Anniversary of her Discovery on the Doorstep an Exhausted and Dying Woman Knocked at the Old Judge's Door. She was Covered with Snow, for it was Snowing. In Faltering Accents she Confessed that the Infant was no Relation of the Old Judge, but her Own Deserted Child. She then Passed Away in the Old Judge's Arms. Was the Old Judge Distressed by her News? No. He had Lost a Grand-Daughter, but he had Won a Bride. And on the Next Christmas Eve there was a Wedding (in the Snow) of Surpassing Splendour at Westminster Abbey, Attended by the Lord Chancellor, the Lords of Appeal, the Lords Justices, the Judges of the High Court, the County Court Judges, and the Three Official Referees. Throughout the Performance (Ran the Instructions of Mr Bluebag) "Goodnight, Sweetheart" and "Always" were to be Performed upon a Mechanical Organ.



Hardly had Mr Bluebag Completed the Manuscript when Mr Bert Baumstein of the Universal Amalgamated Flicks Inc, was Ushered in. He Wished to Consult Mr Bluebag on the Subject of a Broken Contract. Whilst he was Perusing the Contract Mr Bluebag was Startled by the Sound of Muffled Sobs. Looking up, he Observed Mr Baumstein Quietly Weeping over the "Old Judge." Mastering his Emotion Mr Baumstein Enquired whether Mr Bluebag was Free to Dispose of the Performing Rights in the Most Human, Inspiring, Touching and Elevating Scenario he had ever Read. If he were a Willing Vendor Mr Baumstein could Offer Fifty thousand Pounds, Spot Cash, and a Ten per Cent Royalty. Mr Bluebag Closed. "The Old Judge" had a Phenomenal Run in London, Rome, New York, Paris, Vienna, Budapest, Constantinople, and Leningrad, and will Shortly be Generally Released. Mr Bluebag has Retired from the Bar.

MORAL: *Go to the Flicks.* O.

Case and Comment

Contracts — Vendor and Purchaser — Repudiation

IN *Schmidt v Holland* (High Court, Nelson, 20 December 1982, M 1876) the purchasers, having entered into an unconditional agreement for sale and purchase with the vendors, sought to resile from the contract. Settlement did not take place. The vendors' solicitors did not give a notice "making time of the essence" in terms of the agreement for sale and purchase and the property was re-sold. The real estate agents successfully sued the vendors for commission and the vendors issued a third party notice against the purchasers claiming an indemnity. The vendors were successful and the purchasers appealed.

The only substantive issue before the court was whether the purchasers had repudiated the contract and whether the vendors had accepted that repudiation. Although Hardie Boys J rightly pointed out that a mere delay in settlement will not of itself usually constitute a repudiation, in the circumstances, the purchasers had repudiated the contract. The purchasers had failed to pay the deposit, had failed to settle, had purchased another property and had generally evinced an intention not to proceed with the contract. However, Hardie Boys J did not consider that the vendors had accepted the repudiation. Stated more correctly, the vendors had not communicated their acceptance of the purchasers' repudiation.

The first comment that the writer wishes to make relates to the doctrine of repudiation. At common law, there were conflicting authorities as to whether communication of acceptance of a repudiation was required. While some cases required communication, others indicated that the "innocent" party would be regarded as having accepted the repudiation if he manifested his election in some way, for example, by issuing proceedings. (On the question of communication of election, see the discussion in *Dawson and McLauchlan, The Contractual Remedies Act 1979*, pp 75-79). These conflicting authorities may not have been pointed out to Hardie Boys J. Even if they had been, His Honour may still have opted for the more traditional approach which states that communication of acceptance is required.

The question of communication is now resolved, in the absence of contrary contractual stipulation, by the Contractual Remedies Act 1979. if a party wishes to accept a repudiation and thereby cancel the contract, he must communicate his election, so far as it is practicable to do so, in accordance with s 8 of the Act. (Though note *Dawson and McLauchlans'* discussion, op cit, pp 79-81.) The Act applies to all contracts entered into on or after the 1st day of April 1980, so that it is difficult to understand why the provisions of the Act were not relied upon (both with respect to the issue of repudiation and communication of election), the contract having been entered into after that date. (The precise date is uncertain because of a confusion of dates recited on p 2 of the judgment.)

The second comment that the writer wishes to make is a purely practical one. Some practitioners may not be fully aware of the importance of the doctrine of repudiation in the vendor and purchaser context, even where a standard form agreement has been signed. Both the old and the new standard from agreements which have been used (at least in Auckland) deal with only some of the remedies that are available to the parties in the event of a breach of contract and these are expressed to be without prejudice to the parties' other rights and remedies. Accordingly, if one party can be regarded as having repudiated the contract, the other party may regard himself as having the simple election of whether to affirm or disaffirm the contract.

Vendor and purchaser — misrepresentation

The case *Witham v Macpherson* (1982) 1 DCR 431 has already been noted in the *Conveyancing Bulletin* (Vol 1 Issue No 3). The defendant vendors did not disclose to their plaintiff purchasers the fact that their boundary fence encroached on the neighbours' property. The vendors were of course, under no obligation to disclose this fact (it not being a question of title). However, the purchasers were able to recover expenditure incurred in purchasing that part of the neighbours' land that was within the boundary fence line.

The vendors had not only not disclosed the fact of encroachment to the purchasers, but it would also appear that they had not disclosed that fact to the real estate agent who showed the purchasers around the property. Accordingly, when the purchasers made a comment to the agent that the land immediately within the boundary fence line would be suitable for a greenhouse, the agent made no comment whatsoever. This failure to comment was held by the District Court Judge to be an innocent misrepresentation which, because it was made by the agent on behalf of the vendors (who had been, in the Judge's view, reckless in not disclosing the fact of encroachment to the agent), was in effect a fraudulent misrepresentation. Two issues therefore arise. Was the silence of the real estate agent a misrepresentation? If so, and if the misrepresentation was an innocent one, could that misrepresentation be regarded as a fraudulent misrepresentation on the part of the vendors?

The facts of the present case do bear some similarity to the facts of *Spooner v Eustace* [1963] NZLR 913, which was referred to by the District Court Judge. As the Judge rightly pointed out, there was no act of concealment in the

Spooner case. No questions were asked by the purchasers nor were any comments made by them which may have prompted a response from the vendors. The vendors simply did not disclose to the purchasers at any time the fact of encroachment. In the present case, the purchasers made a comment to which the real estate agent made no reply. The question is whether in those circumstances there was a misrepresentation by the agent. It should be noted that none of the circumstances in which silence may traditionally be regarded as being a misrepresenation were present. There had been no positive representation by the agent which was then distorted by the agent's failure to reply to the purchaser's comment. The vendor and purchaser contract was not a contract uberrimae fides (save as to title). There was no fiduciary relationship between the parties. It is therefore difficult to see how the silence of the agent could be regarded, in orthodox terms, as being a misrepresentation, innocent or otherwise.

However, assuming that the Judge arrived at the correct conclusion, it does seem to be a startling proposition that an innocent misrepresentation by an agent can be attributed to the principal as a fraudulent misrepresentation. It would seem to be logical to assume that the misrepresentation could have been either innocent or fraudulent, but not both at the same time. Further, if the misrepresentation of the agent is to be taken as being the misrepresentation of the principal, one would not expect the nature of the misrepresentation to change.

[The Contractual Remedies Act 1979 was not relevant to the decision as the contract appears to have been entered into in 1979].

Sale of goods — principal and agent — bailment — conversion

The facts of and the decision in *Maynegrain Pty Ltd v Compafina Bank* (1982) 2 NSWLR 141 are both intresting and complex. Accordingly, this note is intended only to focus attention on the decision and no attempt will be made in the space allocated herein to discuss the decision in detail.

C Claimed and recovered damages from M for the conversion of a large quantity of barley and for the detention of a small quantity of the same grain. The barley was originally owned by B and was delivered by B to M for storage. The bailment was expressed to be subject to the rights arising under any pledge. The barley had been stored by M with other barley not belonging to B and the bulk of that barley was delivered by M to a ship where most of it was lost.

C claimed that B had pledged the barley to it in return for C's promise to make loans to B. C's claim depended on there having been constructive delivery of the grain to it by M (there having been no actual delivery). Constructive delivery was alleged to have been effected by an attornment by M by virtue of certain documents addressed by M to the ANZ Banking Group Limited, the agent for C. The fact of agency was not known to M, and M argued that the existence of an undisclosed principal precluded there having been an attornment.

As there was no authority directly on point, the Court has to consider the matter on principle. The Court first referred to a passage of a judgment by the Privy Council in *Official Assignee of Madras v Mercantile Bank of India Ltd* [1935] AC 53 at 58, 59 whereby it was recognised that a pledge could be effected by the pledgor instructing the bailee to hold the goods on behalf of the pledgee, the change in possession being perfected by the third party attorning to the pledgee; ie acknowledging to the pledgee that he holds the goods on the pledgee's behalf. An estoppel is then said to arise which prevents the attornor from denying the right of the attornee to the possession of the goods. Accordingly, the question in the present circumstances was whether the attornment in favour of the ANZ was an attornment in favour of C. The Court considered that the doctrine of the undisclosed principal applied and it was therefore essential to determine whether a right of possession could be given by attornment in respect of an unappropriated and unseparated part of a larger amount of grain. The Court also considered that the principle of estoppel precludes the attornor from denying that there has been an appropriation, provided that there has been an attornment. Accordingly, on the facts the Court considered that a pledge had been effected in favour of C when M attorned the grain in favour of the ANZ Banking Group Limited and the goods had therefore been converted by M. Damages were awarded in favour of C being essentially the difference between the debt owed by B to C (secured by the pledge) and the sum received by C on the sale of the barley that remained.

As there is no apparent reason why the doctrine of the undisclosed principal should not have been applied by the Court in the circumstances, only the question of estoppel will be briefly discussed.

Hope J A stated that a pledge may be effected by constructive delivery, apart from the doctrine of estoppel. Estoppel would therefore appear to be supportive and not essential to the pledge. However, on the facts, because the grain had been mixed with other grain, it was necessary to rely on the doctrine of estoppel to prevent M from successfully pleading that there had been no constructive delivery and therefore no pledge. According to the cases (and in particular *Knights v Wiffen* (1870) LR 5 WQB 660) the estoppel is either a promissory estoppel or an estoppel by convention. Although the cases cited by Hope JA are not without difficulty, estoppel concepts should be capable of application to circumstances similar to those in the present case, provided that the essential requirements of the doctrine are met, ie a representation (generally intended to be acted upon), reliance upon that representation (generally to the detriment of the representee), these factors giving rise to a set of circumstances which made it inequitable for the representor to insist upon its strict legal rights. These general requirements will not ordinarily differ according to the nature of the estoppel, as has been recently explained by Oliver J in *Taylor Fashions Limited v Liverpool Trustees Limited* [1981] 2 WLR 576 and by Goff J in *Amalgamated and Property Co v Texas Bank* [1981] 2 WLR 554 (though when the latter case went to the Court of Appeal, the doctrine of estoppel was not given as full a consideration).

Contracts — exclusion clauses — sale of goods

From the writer's point of view, the intrest in *George Mitchell (Chesterhall) Limited v Finneylock Seeds Limited* [1982] 3 WLR 1036, lies in the fact that the majority of the Court of Appeal adopted the "Cootesian" view of the function of exclusion clauses (Coote, Exception Clauses. 1964).

The case concerned a contract for the sale of winter cabbage seed from the defendant seed merchants to the plaintiff. In fact, the seed delivered to the plaintiff was autumn cabbage seed which was, in any event, commercially useless. When the plaintiff sued the defendant for damages, the defendant purported to rely on conditions of sale which were printed on the reverse side of an invoice which was delivered with the seeds. (The plaintiff had placed a verbal order for the seeds.) Inter alia, the conditions provided that if the seeds did not comply with the express terms of the contract or proved defective in "varietal purity", the defendant's liability was to be limited; the defendant's liability for any loss or damage arising from the use of the seeds was to be totally excluded except to the extent of liability for the replacement of the seeds or a refund of price; and all express or implied conditions or warranties were excluded.

It appears from the judgment of Kerr LJ that the plaintiff sued on the basis of breach of the conditions as to compliance with contractual description and merchantable quality implied by the Sale of Goods Act 1979 (UK). Although the seed was cabbage seed it was not winter cabbage seed and the Court considered that, exclusions apart, there was clearly a breach of the implied condition as to compliance with contractual description (although this is only fully articulated in the judgment of Kerr LJ). Further, if the seed was commercially useless, the implied condition as to merchantable quality had been breached. This aspect of the case is unexceptional, though on the matter of description, the writer refers readers to Professor Coote's article (1976) 50 ALJ 17 and his note in (1977) 51 ALJ 44.

However, the defendant pleaded that in fact no breaches of any kind had occurred by virtue of the exclusions in the conditions of sale or alternatively, if they had, then its liability was limited by virtue of those provisions. The Court of Appeal unanimously rejected these contentions, though there was a difference in approach particularly between Lord Denning on the one hand, and Oliver and Kerr LJJ on the other hand.

With customary eccentricity, Lord Denning considered that the defendants could not rely upon the exclusions. Firstly, in his view, the result of the decision in *Photo Productions Limited v Securicor Transport Limited* [1980] AC 827, was that exclusion clauses can be relied upon only if they are reasonable. in the circumstances of the present case, Lord Denning considered that, for various reasons, the clause was not reasonable. Secondly, s 55(3) of the Sale of Goods Act 1979 provides that terms in contracts for the sale of goods shall not be enforceable if it is demonstrated that it would not be fair or reasonable to allow reliance on the term. Again, Lord Denning considered that it was not reasonable for the defendant to rely on the clause in the circumstances.

Oliver and Kerr LJJ reached the same conclusions but for different reasons. While both Judges would have considered, had it been necessary to do so, that it was not fair or reasonable for the defendant to rely on the exclusions and limitations in the conditions of sale in the circumstances (for the purposes of s 55(3) of the Sale of Goods Act 1979), what interests the writer is that both Judges applied the theory of the function of exclusion clauses precisely as ennunicated by Professor Coote. Both Judges considered that the function of an exclusion clause is to qualify the rights and obligations mutually assumed by the parties to the contract. In all cases therefore, it is a question of construction as to whether an exclusion clause applies to particular facts. Only in cases where giving effect to the exclusion clause would render the contract illusory (it being assumed that the parties did intend a contract) should the exclusion clause be deprived of its effect. Accordingly, in the present case, and apart from the provisions of the Sale of Goods Act, Oliver LJ considered that the exclusion clause could not have been intended to exclude liability for a total misperformance of the contract and, as this is what had occurred, the exclusion clause was considered (as a matter of construction) not to relieve the defendant from liability. Both Oliver LJ and Kerr LJ considered that, as a matter of construction, parties who intend to contract cannot be presumed, at the same time, to have a contradictory intention of excluding all liability for their failure to perform their contractual promises. Thus, Oliver LJ was able to state that the reference in the conditions of sale to "seeds" must be understood to have been a reference to "winter cabbage seeds" to give the conditions, and indeed the contract itself, efficacy. Kerr LJ considered that the defendant had been negligent and that the exclusions and limitations did not, as a matter of construction, protect it.

The judgments of Oliver LJ and Kerr LJ are well worth reading for their customary clarity and logical appeal. It may be that by virtue of such provisions as s 55(3) of the Sale of Goods Act 1979 and the provisions for the Unfair Contract Terms Act 1977, English Judges feel that they can more readily adopt the undeniably logical view of the function of exclusion clauses as ennunicated by Professor Coote. However, notwithstanding the absence of similar legislation in New Zealand, the New Zealand Courts may still be influenced by the more recent English judgments. This possibility is important as the only provisions of the Contractual Remedies Act 1979 which apply, with certainty, to contracts for the sale of goods are s 4 and 6 which deal with misrepresentations. Although the exclusions in the *Mitchell* case did refer to representations, representation was not an issue. Accordingly, if the *Mitchell* case was decided in New Zealand, it would be open to a New Zealand Court to follow the approaches of both Oliver LJ and Kerr LJ and reach the same conclusion. (The approach has the express support of Lord Diplock in *Photo Productions Limited v Securicor Transport Limited,* supra.)

[Leave to appeal to the House of Lords has been granted.]

S Dukeson

Briefly Noted

Testamentary capacity — The rule in Parker v Felgate— an illogical exception?

In this brief article the author, Julie Maxton examines the rule in the light of a recent English case. Her comments certainly provoke thought.

The rule

The *Rule in Parker v Felgate* (1883) 8 PD 171 was developed by the Chancery Courts in moments of leniency in the late nineteenth century. One hundred years later its continued presence attracts harsh criticism from potential reformers of the law of succession. Recent reference to the rule by Slade J in *In re Flynn (deceased)* [1982] 1 WLR 310 may serve to hasten its demise. On the hearing of an originating summons in that case, Slade J held, without giving judgment on the merits, that the rule was relevant to the argument concerning want of knowledge and approval.

> The authorities appear to show that in a case where a testator, even in a state approaching insensibility, has executed a testamentary instrument drawn up in accordance with previous instructions, he will be held to have known and approved of its contents if, at the time of execution, he was capable of understanding and did understand that he was engaged in executing the will for which he had given instructions, even though at the moment of execution he might not have remembered those previous instructions and would not, at that moment, have understood the provisions of the will, if read to him clause by clause. . . ." (p 320)

He continued:

> However, if a litigant is successfully to avail himself of this principle he must . . . satisfy the Court at least that the testator at the time of execution was capable of understanding and did understand that he was executing the will for which he had given instructions.

This rule, known as the *Rule in Parker v Felgate,* is objectionable in principle. In order to execute a valid will a person must

(1) be over 18 years of age (*s 2, Wills Amendment Act 1969*)
(2) comply with the formalities of *s 9, Wills Act 1837* as to writing, signature and witnesses, and
(3) have an *animus testandi.*

As to the third requirement, the mental intention necessary to make a will, the classic statement is to be found in Cockburn CJ's judgment in *Banks v Goodfellow* (1870) LR 5 QB 549:

> As to the testator's capacity, he must, in the language of the law, have a sound and disposing mind and memory. In other words, he ought to be capable of making his will with an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of, of the persons who are the objects of his bounty, and the manner in which it is to be distributed between them. It is not necessary that he should view his will with the eye of a lawyer, and comprehend its provisions in their legal form. It is sufficient if he has such a mind and memory as will enable him to understand the elements of which it is composed, and the disposition of his property in its simple forms. (p 567)

The *Rule in Parker v Felgate* thus represents an exception to the principle (designed, primarily, to prevent fraud) that a testator must have full mental capacity at the moment he executes his will. Prima facie therefore, the potential for fraud would appear to be facilitated rather than frustrated. For these reasons it is submitted that the rule is illogical and dangerous: it allows a testator to execute a testamentory document while not fully aware of his actions, contrary to *Banks v Goodfellow.* Further, it deprives a testator of the liberty to alter his instructions at any time before execution: failure fully to comprehend the document when his signature is appended prevents the testator from possessing the requisite mental capacity to decide that his previous instructions ought to be altered. The scope for abuse which the doctrine affords is manifest. An unscrupulous draftsman may alter the testator's instructions so that when executing his will the testator *does* remember giving instructions and *understands* that he is executing a wil in accordance with those instructions but is completely unable to comprehend whether the document he is presently signing was drawn up in conformity with his instructions or not. In the absence of witnesses *both* to the giving of the instructions *and* to the final draft of the will such a fraud could go undetected.

Room for abuse

Professor Mellows, in the course of criticising the lack of principle in the rule, accepts that the rule, first, "saves wills in *bona fide* circumstances" and, secondly, "is a means of upholding wills in circumstances in which the Courts favour them being saved" (*The Law of Succession, Third Edition*, at p 57).

With regard to the first point, it would be more accurate to state that the rule saves wills which are not found to be executed in bad faith. An organised and well-prepetrated fraud would ensure that a will presented for probate had the appearance of being executed "in *bona fide* circumstances". Undoubtedly, the rule does save some wills executed in good faith but is the potential for abuse, already alluded to, adequately guarded against?

The cases of *Perera v Perera* [1901] AC 354 and *Singh v Amichand* [1948] 1 All ER 152 emphasise that the Courts will only apply the rule where there is no ground for suspicion. In the latter case Lord Normand expressed the opinion of the Privy Council:

> "[T]he principle enunciated in *Parker v Felgate* should be applied with the greatest caution and reserve when the testator does not himself give instructions to the solicitor who draws the will, but to a lay intermediary who repeats them to the solicitor. The opportunities for error in

> transmission and of misunderstanding and of deception in such a situation are obvious, and the Court ought to be strictly satisfied that there is no ground for suspicion, and that the instructions given to the intermediary were unambiguous and clearly understood, faithfully reported by him and rightly apprehended by the solicitor, before making any presumption in favour of validity. (p 155)

Despite the confidence in the legal profession which such a statement assumes, disreputable actions may still be perpetrated. Perhaps more commonly, however, mistakes may occur in the reduction of the instructions to the final copy of the will which is presented to the testator for signature. In most cases where the rule is applicable the testator will not be sufficiently mentally alert to recognise any such discrepancies. Unwittingly, therefore, a testator's wishes will not have been carried out in the document which apparently conformed with his previous instructions and which he signed as his will.

It is submitted that confining the operation of the rule to testators who have given instructions to a solicitor as opposed to a lay intermediary does not solve the problems which the rule creates. Injustice may yet be done, not least because of the inherent uncertainty in the rule itself and in its application.

Professor Mellows makes tacit reference to this uncertainty in his second point by recognising that the rule provides "a means of upholding wills in circumstances in which the Courts favour them being saved". Such a use for the rule is symptomatic of a general tendency on the part of the Courts to stretch basic principles in order to obviate the necessity to give decisions in conformity with the strict requirements of the formalities. Rigid adherence to inelastic formalities has generated a body of hard case law and resulted in a desire on the part of the Courts to do justice despite rather than according to them. Examples of hard decisions can be found in such cases as *Re Davis* [1951] 1 All ER 290, *Re Colling* [1972] 3 All ER 729 (wills struck down because the witness requirements were not strictly complied with). *In b Harris* [1952] P 319, *In e Bercovitz* [1961] 2 All ER 481, *In e Bean* [1944] P 83 (testators' signatures incorrectly placed on the documents resulting in the wills being invalidated). The dissatisfaction of meting out decisions like these simply because unyielding requirements remain unfulfilled although no suggestion of fraud (the reason for the formalities) is evident has compelled the Courts towards the thinking articulated by Professor Mellows. However, case by case first aid varies with the skill and willingness of the dispenser. It is therefore urged that the uncertainty inherent in such a practice be removed by ridding the law of exceptions to basic principles (such as the *Rule in Parker v Felgate*) coupled with a review of those basic principles themselves. Justice could then be more effectively administered.

Reform

The reform of the execution requirements in succession law has already come under review in several jurisdictions, notably Queensland, South Australia, Manitoba, British Columbia and Israel. Recommendations vary from a willingness to accept as valid a will executed in substantial compliance with the formalities of *s 9, Wills Act 1837* (1978 Report of the Law Reform Commission of Queensland) to the recommendation of the 1978 British Columbia Law Reform Commission that:

> The Wills Act be amended to permit the Supreme Court to admit to probate a document capable of having testamentary effect notwithstanding that it has not been executed in compliance with the required formalities if:
>
> (a) the instrument is in writing and signed by or on behalf of the deceased, and
>
> (b) the Court is satisfied that the deceased intended the document to have testamentary effect. (pp 67-68)

The adoption of less rigorous requirements for the execution of one's testament (accepting that *some* formalities are necessary to prevent fraud) would ensure that wills which "ought to be saved" could be saved without resort to legal gymnastics or exceptions of the ilk of the *Rule in Parker v Felgate*.

WORDS

"Oversee"

MY tilt at "oversee" in [1981] NZLJ 423 seems predictably to have had the same outcome as Don Quixote's tilt at the windmill or Canute's command to the sea — the word flourishes, and in the most respectable contexts.

I freely acknowledge that such usage is etymologically unexceptionable — the first meaning of "oversee" in the *Shorter Oxford Dictionary* is "superintend or supervise". However, I still maintain that its use in this sense jars, even worse being the inherent ambiguity in the use of "oversight" in the sense of supervision rather than in the more accepted sense of an inadvertent omission. Some evidence that others are troubled by the passive sound of this word and are looking for a more active alternative is afforded by the use in a recent newspaper article of "overwatch". In my humble opinion "overwatch" is an interesting and preferable alternative to "oversee", for those who jib at the latinity of "supervise". My next task is obviously to lobby the editorial board of the *Oxford English Dictionary*!

Verbosity

As a small contribution to the current debate on cumbersome legal phraseology I offer the following examples of impressive-sounding rotundities that find favour with some of these who write judgments and legal articles:

by reason of the fact that	(because)
notwithstanding the fact that	(although)
in the event that	(if)
is indicative of the fact that	(indicates)
advised him of the fact that	(told him)
subsequent to	(after)
made application	(applied)

Peter Haig

Solicitors Approval Clauses

It is somewhat unusual for the correspondence columns of the *Journal* to be used for adding an addendum to a published article, however in this case, the importance of the subject matter persuaded its inclusion on these pages.

DEAR SIR

The writer's article on solicitor's approval clauses was published in the December 1982 issue of the *Law Journal*. One of the points made in that article was that solicitor's approval clauses can still perform a useful function in constituting a check on the draftsmanship of real estate agents. The writer also made the point that an alternative to including such a clause in an agreement is to have the agent forward the agreement to the acting solicitor before the agreement has been signed. Unfortunately, some agents are reluctant to allow agreements to be checked by solicitors before signature. Since the article was published, two of the writer's clients have been advised by real estate agents that there was no need for them to consult him and that the agreements for sale and purchase were straightforward. This was despite the fact that the writer's clients had informed the agents that they had been advised by the writer not to sign the agreements before they had been checked. In neither case were the agreements straightforward and fortunately, in both cases, the writer's clients sought his advice before signing the agreements.

It is clear that other solicitors have encountered similar difficulties. For example, one solicitor's clients were apparently advised by an agent that signing an agreement for sale and purchase would not bind them to a contract. Other examples recited to the writer have often related to inadequate drafting by agents. These have included:

(a) Where a party is both selling and buying, the inclusion of a purchase date in their purchase agreement in advance of the sale date in the sale agreement thereby obliging that party to arrange bridging finance or pay penalty interest;
(b) Insufficient time for a party to satisfy, for example, a finance condition;
(c) No dates at all specified for the satisfaction of, for example, finance conditions. This means that in terms of orthodox contractual principle, the condition may be satisfied at any time up until the date specified (if any) for settlement.

Many of the drafting defects created by real estate agents can be, and often are, rectified by the respective solicitors for the vendor and purchaser. However, this often involves additional expense for the parties and there are occasions where it is simply not possible to resolve the problems created. For example, there my be a chain of sales and purchases which makes it impossible to rationalise the dates for one party's transactions.

It is apparent that some agents are acting irresponsibly and it is imperative that the attention of the Real Estate Institute is drawn to such situations. It is unsatisfactory for agents, some of whom apparently consider themselves to be skilled legal technicians, to advise prospective buyers and sellers that it is unnecessary for them to consult their solicitors and it is reckless for these agents to make statements of law which are incorrect. While solicitors are not infallible, recognition should be given to the extensive powers which real estate agents have in the form of committing parties to contracts without receiving the benefit of legal advice and the exercise of these powers should be strictly monitored. It is no answer to state that on the new form of agreement for sale and purchase there is warning to prospective parties that upon signing the agreement, a binding contract will be concluded. In the face of representations by an agent that there is no need to seek legal advice and that the agreement is without complication, a prospective party will not be encouraged to take heed of the warning printed on the agreement.

In summary, it is imperative that clients be made aware of the importance of the agreement which they will sign when buying or selling real property and it is important to ensure that the agreement for sale and purchase is perused by a solicitor before it has matured into a binding contract. In circumstances where prospective parties are not already represented by solicitors, some check must be maintained upon the activities of real estate agents. This check can only be undertaken in the form of incorporating a solicitor's approval clause into the agreement or by ensuring that there is a cooling off period for the parties once they have signed the agreement (this requires a change of thinking and of format of course). In the meantime, it is absolutely crucial when solicitors encounter difficulties with real estate agents that these difficulties are notified to the Real Estate Institute so that action can be taken to discipline the agents involved. This supervision will benefit the majority of real estate agents, who are no doubt acting responsibly on a day to day basis.

S Dukeson

DEAR SIR,

While thoroughly enjoying Mr Dukeson's article in the December issue I found myself wishing that he had included a glossary together with his footnote.

Could he please define or explain the word "synallagmatic"?

Yours faithfully

NIGEL FAIGAN esq

Mr Dukeson responded:

In answer to Mr Faigan's query, the term "synallagmatic" comes from the Greek "synallagma" meaning "agreement". The term more accurately describes what is commonly described as a "bilateral" contract in the sense that it recognises that there may be more than two parties to a contract. However, for all intents and purposes, the terms can be used interchangeably.

The term "synallagmatic" has been used by common lawyers for some time (see *Williston on Contracts* (3rd ed), Section 893 p 663) although the English Courts appear to have adopted the term only in recent times (see for example *United Scientific Holdings Limited v Burnley Council* [1978] AC904, per Diplock LJ). On reflection, it is probably fair to say that the term is little used in New Zealand.

Company Law

Some comments on the first part of Mark Russell's article on the Companies Amendment Act 1982, the second part of which appears in this issue:

DEAR SIR

As Senior Research Officer of the New Zealand Society of Accountants I have, presently, a continuing interest in the development of interpretations of the Companies Amendment Act 1982 and I was interested to read Mark Russell's commentary on that Act. I was particularly interested in his discussion of pre-acquisition profits as I have held what I consider to be a significantly different view of the requirements of the Companies Act on this point. In making this commentary I must stress that the views expressed are my own and do not necessarily reflect the views of the Society or its advisers.

My own understanding is that the bar on distribution of pre-acquisition profits does not derive from meaning imputed to para 16(5) of the Eighth Schedule. It has always appeared to me to be unlikely that a matter as significant as the distributability of reserves should be relegated to an indirect reference in a Schedule to the Act when, for instance, the restrictions on the distributability of share premiums were clearly ensconced in s 64. The implication that the Act bars the distribution of pre-acquisition profits is derived from the statement in para 16(5) that such profits could not be treated in the holding companies accounts as revenue profits or losses. In an Act where there is no real distinction between capital and revenue profits and no bar on the distributability of capital reserves it is difficult to impute prohibition on distributability from the use of the word "revenue" in this context. In short, the Act appears to provide no bar on the distribution of pre-acquisition profits by a subsidiary to its parent company nor any clear prohibition against the onward distribution of such profits from the parent company.

The prohibition against the distribution of pre-acquisition reserves derives more clearly from accounting convention than from law: simply, where, as in most conventional purchases, the acquisition is accounted for at market value, the payment of a dividend from pre-acquisition reserves provides an accretion to the reserves of the parent company which is matched by a charge to reflect the fall in value of the subsidiary consequent upon the transfer of a part of its wealth to its parent company. In such circumstances no reserves arise in the parent company from the transaction. Merger accounting, by using par or nominal values for the shares acquired, obviates the need to make the matching charge, thereby allowing the dividend from the subsidiary to flow unhampered to the ultimate shareholder.

My interpretation of para 16(5) of the Eighth Schedule is that it has nothing to do with the distributability or otherwise of pre-acquisition profits. It should be read closely with para 16(4). The meaning of the combined paragraphs is that:

(i) where group accounts are not prepared shareholders are entitled to information about the performance of subsidiary companies;

(ii) if the information is to provide a useful measure of management it should only reflect performance since acquisition;

(iii) the accounts of the holding company do, in a share for share acquisition, include the pre-acquisition profits of the acquired company. These are included in the share premium and, under the old rules, were not for "these (ie Eighth Schedule para 16(4)) or any other (ie s 64) purposes properly treated in the holding company's accounts as revenue profits or losses." They were included in a non-distributable share premium account. Consequent upon the changes incorporated in the Companies Amendment Act pre-acquisition profits or losses are still reflected in the share premium, but, as that no longer has to be taken to a separate account, are presumably included in the revenue profits or losses of the holding company. As a result of this it is no longer appropriate to retain the phrase "or any other purpose".

It is my view, therefore, that the amendment to para 16(5) has done nothing to extend the distributability of pre-acquisition reserves beyond anything done by the amendments to s 64. Thus where a company is acquired for cash, pre-acquisition reserves remain non-distributable by operation of the accounting convention already referred to that has always restricted distributability. Indeed, whereas under the principles of merger accounting the pre-acquisition reserves remain distributable, under the revision of s 64 the acquisition is still accounted for at value and accordingly the accounting convention still applies. The consequence of this is that the pre-acquisition reserves remain non-distributable: what is distributable now is the premium on the issue of the shares. This distinction is important because, whereas pre-acquisition

profits are measured by reference to the nominal value of the capital of the acquired company, the share premium is measured by reference to the nominal value of the company issuing the shares. If the nominal value of the shares issued is less than the nominal value of the shares acquired then a part of the fixed share capital of the acquired company, is translated into the distributable reserves of the acquiring company by the medium of the share premium.

Yours sincerely

C N Westworth LLB, ACA
Senior Research Officer
New Zealand Society of Accountants

Legislation

DEAR SIR,

Re: *Legislation*

In this day and age of ever increasing technolgical marvels surely something can be done about the printing of our legislation. Having just spent two hours wading through The Broadcasting Act 1976 and endeavouring to co-relate the alterations made, not by one but by *two* extensive amendments to the Act in 1982 alone, I am driven to the frenzied state of appealing through you for "Something To Be Done".

It is just not good enough that one needs to have in one's left hand the main document and in one's right had one, two, three or more supplementary documents which add to, or subtract from, the original document with the time-honoured phrases "is hereby amended by omitting such and such and substituting such and such".

I guess that most of the legal profession has now at last seen the tremendous benefits of word processing machines. Gone are the bad old days when draft after draft of complicated documents or lengthy letters went marching back to the secretary for entire re-typing.

Surely to goodness the Government Printer can be authorised to acquire some such machine so that whenever this or that Act or Regulation is amended he needs only to key in the changes, hit the button and the whole document is reproduced with all amendments incorporated. The flood of legislation grows larger and larger each year (much of it like the Credit Contracts Act, of course totally unnecessary) and the complexity increases in line with the current New Zealand attitude that you can solve anything by legislating on it.

To try and preserve some sanity for we poor devils who have to advise clients on their legal rights under legislation surely the latest technology should be utilised to the full.

I hope the New Zealand Law Society can persuade Government of the obvious efficencies that can be achieved.

Yours truly,

W L Allen

The Privy Council

DEAR SIR,

The Minister of Justice has very appropriately raised the question as to whether the time is ripe to free ourselves from the justice which is currently available at one of the most respected homes of law in the world, the Queen's Privy Council. It is a privilege which we, as New Zealanders have. It is not one which is available to those who live in England nor is it available to those who live in the Commonwealth countries whose Governments have already broken ties with that Court.

The Minister requests public debate on the matter but he neglects the most important issue of all. He gives no hint of the alternative. The shambles of the Samoan Citizenship issue resulted from their Lordships' interpretation of the law of New Zealand. Surely this must be the strongest case for the retention of the Privy Council for the judgment was based fairly and squarely upon the law as it was written — not as Government or the local Courts thought it was written.

If the result of that judgment was a bitter pill is it not also a warning that something is worng in our system? Every amendment which Parliament is obliged to make to overcome some unforseen problem can surely be viewed as further evidence that it is time for an internal overhaul. Already New Zealand has more footage of statute books than England (with twenty times our population) and it has been estimated that over half is in the form of amendments. Something seems radically wrong at the start of the process and as a first suggestion it may be wise to look for flaws at our end before we even consider making changes aimed at little more than ridding ourselves of embarrassing situations.

Perhaps one of the keys to the matter can be found in a statement made in 1975 by Lord Simon of Glaisdale; a much quoted and respected member of the Privy Council: "Where a statute is dealing with people in their every day lives, the language must be presumed to be used in its ordinary sense."[1]

One wonders whether those words are ever heeded by those who endeavour to draft simple provisions into the form of an Act, for they continue to use legal jargon which must surely confuse the drafters themselves, let alone the Courts or the public who later become the pawns in the chess board of the Court floor.

In the writer's opinion, if one ever wants an example of the effect of incomprehensible drafting and our Courts' inability to cope with it one need only turn to the Matrimonial Property Act 1976. When the Bill was before Parliament the now Minister of Justice advised the House that in his opinion, the suggestion that the Bill was in some way representing a confiscation of property, was irresponsible, and that it only divided the working capital of a marriage partnership "in contrast, for example (of property) achieved by . . . incomes ranging well outside normal family needs".[2]

Within a few months the Presidnet of the Court of Appeal expressed his opinion.[3] That opinion was precisely that which had been described to the House as an irresponsible view. The Minister reacted and the law was, some 14 months later, amended. The amendment, said the Minister, would put the Act back to the original intention

of Parliament.[4] It didn't — for the Courts are to this day dividing property achieved by incomes ranging well outside normal family needs and it is doubtful whether even the Minister of Justice understood the effects of the amendment he tabled.

When the first case concerning the Matrimonial Property Act went for a ruling to the Privy Council the amendment had already been passed but the decision of the Government to withhold any justice of the amendment from those already involved in Court proceedings prevented their Lordships from giving any consideration to it.

In the subsequent judgment their Lordships stated that they considered that the Courts "in the society where the spouses belong are in a position far superior to that of their Lordships in forming a judgement".[5] Could there ever have been a more ironical statement from that famed Court, the law Lords of which represent the top legal brains of the world? What then is wrong?

If the Courts act upon the ordinary meaning of the words and our legislators have difficulty in using ordinary words to express their intention then, surely, that is the place to start correcting matters. If the laws are clear enough the Privy Council becomes superfluous. The legal fraternity will say that the English language is always open to ambiguity and therefore doubt must always be a factor. That holds no ground if Parliament takes the necessary step to ensure that the reasons for various sections of an Act are contained within an appendix to every Act.

While the ordinary meaning of the words are of prime importance the intention of Parliament is also of consideration to the Court. If the *reason* for any particular provision in an Act is available to the Court, ambiguity of words becomes a minimal problem. Other countries make similar provisions and there can be no valid reason why New Zealand should not adopt such a procedure.

Explanations of provisions contained in supplementary order papers are available to Parliamentarians and it is a short step to make similar explanations available to the Courts. To keep this information from the Courts is archaic. It fosters nothing but room for doubt and business for barristers.

If a member of the medical profession carried out a fatal operation while admitting that the instructions under which he worked were without reason and were not understood, the Courts would be the first to say he was irresponsible. Why then do our Courts still carry out their operations when Judges themselves admit to "such a wide diversity of opinion" of the meaning of certain provisions that "even to record them would be more confusing than helpful"?[6]

I lost my case at the Privy Council but I lost it understanding the rules which Government requries the Courts to adopt. Those rules prevented any reference to any amendment or to any statements made to Parliament by the Minister of Justice. The judgment was made on the wording of a law — acknowledged by the Minister to be passed by Parliament while badly drafted.[7] If there had been explanations as to the reasons why the Matrimonial Property Act contained certain paragraphs the President of the Court of Appeal may not have been so prepared to express his opinion, the expense of the Privy Council may have been avoided and Parliament may not have put me and many others in a situation where the Courts confiscated what is now acknowledged as the separate property of a party.

Surely we should get our own House in order before we even think of removing the last resort of our present Justice and the Minister should await the decision to be given over Mr Justice Mahon's case bfore he expresses the opinion that our own Judges are quite capable of coping with our own affairs. In the United Kingdom there is the last appeal to the House of Lords but there is no such equivalent in this country and it would be highly dangerous to remove a right that is our heritage without an adequate replacement.

1 *Maunsell v Onins* [1975] AC 373, 391; [1975] 1 All ER 16, 25.
2 *Hansard*, 9 Dec (1976), p 4721/1.
3 *Reid v Reid* CA [1979] 1 NZLR 572.
4 *Hansard*, 28 Oct 1980, p 4498.
5 *Reid v Reid* Privy Council, 20 April 1982.
6 *Reid v Reid* CA [1979] 1 NZLR 595.
7 *Hansard*, 28 Oct 1980, p 4498.

Tony Reid

Correspondence — A plea for the plural

By "correspondence" I mean not letter-writing but the rule of language that a singular noun should be followed by a singular verb and a plural noun by a plural verb, and similarly that any personal adjectives or pronouns that have different forms for singular and plural (eg, his, us) should equally correspond to the number of the noun they refer to.

The flagrant breaches of this rule that appear everywhere seem to be an undesirable spin-off from the feminist campaign against masculine stereotyping in word-forms. In the old days one had no trouble in writing, "anyone who does that deserves what he gets", but today that form is considered sexist and, if one is to start "anyone who . . ." one is left with two unsatisfactory alternatives:

(a) "anyone who does that deserves what he or she gets", or
(b) — and this is the form almost universally preferred — "anyone who does that deserves what they get".

The solution, not often found, is to couch the whole sentence in the plural, thus: "people who do that deserve what they get".

The use of any collective noun like "team" or "group" in the singular often leads to infringement of the rule of correspondence, because the writer refuses to decide whether to treat it (them) as singular or plural. It is a matter of consistency. Too often the reader is switched disconcertingly from one to the other in the course of a paragraph, or even a single sentence — eg "the team was worried at the accommodation they were offered". Because the use of "it" and "its" are often felt to be awkward in this context, the solution again is to choose the plural form from the beginning and stick to it — eg "the team were worried at the accommodation they were offered". If you dislike "the team were . . .", the problem can often be eliminated by a little thought, eg in this case by simply writing "the team was worried at the accommodation offered".

Peter Haig

Tribute to Sir David Smith

"It perhaps falls to few man to earn that knightly tribute 'sans peur et sans reproche'. These words however can without affectation be applied to Sir David Smith who throughout his long career as a Judge has displayed not only intellectual ability and industry of the highest order, but also judicial integrity and a passion for justice that has earned the unfeigned admiration of us all."

What finer tribute could be paid to a Judge than that tribute contained in a letter from the Canterbury District Law Society which was read out by Mr P B Cooke, KC President of The NZ Law Society to Sir David Smith at a function held in the Wellington Supreme Court to mark his retirement. That retirement after 20 years of office as a Judge of the Supreme Court took place in 1948 — 35 years ago.

Sir David Smith retired as a Judge in 1948. His retirement is recorded in the pages of this *Journal* in June of that year. Since that time this *Journal* has been privileged to receive and publish, from time to time, some of his writing. Indeed as recently as June 1980 the *Journal* published a stimulating article on *Ground Rents*, a piece which will be of continuing interest to lawyers in the field for years to come.

It is with sadness, therefore, that we publish this a tribute to Sir David Smith's life and work. We are proud to stand with the rest of the profession who have shared in the benefits of his contributions.

What follows are the tributes paid to Sir David Smith in the High Court at Wellington on 4 March 1983. The first is from the Chief Justice Sir Ronald Davison followed by Mr R G Collins on behalf of the New Zealand Law Society and Mr J W Gendall for the Wellington District Law Society.

Today we gather in this Court, in which Sir David frequently sat during his period of 14 years as a resident Wellington Judge, to pay tribute to his life and service over a lifetime of 94 years, ended only on his death on 29 December 1982.

I intend to speak of Sir David Smith — The Judge. Other speakers who will follow will no doubt make reference to other areas of Sir David's life: As a student at the university; in his practice of the law; his participation in the affairs of the Wellington District Law Society; his interests in the Returned Servicemen's Association; the New Zealand Alliance; the Rotary Club; the Heritage Movement; the Crippled Children's Society; the United States Educational Foundation; the Board of Trade; and in particular to what might be termed his second career after retirement — His interest in education and the University of New Zealand of which he was the last Chancellor and over the demise of which he presided in the year 1961.

In the case of many practitioners present here today Sir David was appointed a Judge before you were born. For many he had retired (in 1948) before you commenced practice. For many more he was the person whose signature as Chancellor of the University of New Zealand appears at the foot of your degree certificate.

Sir David Smith was appointed a Judge at the unusually young age of 40 years. His work at the Bar had early brought him to the notice of the profession by reason of his industry and scholarship. As he himself said of his early years in the law:

> I wanted to succeed and if there was work to be done it did not occur to me that hours of work mattered or that there was such a thing as overtime.

It was typical of him that he approached his work on the Bench with modesty and with diligence.

At his farewell on retirement he said of his duties as a Judge:

> When I commenced my duties as a Judge I had a lot to learn. I knew I had a lot to learn but I think I can say that I have tried to learn the work of a Judge. I hope I have escaped the extremes of the Judge who was so quick that it was said of him that he decided a case without hearing, and of the Judge who as so slow that it was said of him that he heard a case without end, and I have tried never to part with a case without thinking that my conclusion was correct at the time, however I might be subsequently enlightened by the Court of Appeal or the Privy Council.

The first six years of Sir David's judicial life were spent in Auckland. He then moved to Wellington in 1934 and remained a resident Wellington Judge until his retirement. His service as a judge was not limited to presiding over his Court or sitting as a member of the Court of Appeal. In 1934 he was appointed by the government of the day to chair the Native Affairs Commission, and in 1945 to chair the Royal Commission on Licensing.

Sir David has been described by Sir Robin Cooke who knew him well as, along with his teacher Sir John Salmond, one of the outstanding philosopher Judges in New Zealand legal history. He was what one might describe as a model Judge — attentive, infinitely patient, meticulous in his consideration of facts and law and bringing to his interpretation of the law a logical coherence in accord with his philosophical approach to law as an entity rather than a mere collection of rules.

How well Sir David as a Judge portrayed the image of justice was expressed at his retirement sitting in these words:

> No litigant has left your Court without the satisfaction of knowing that whatever the result you had addressed your mind with tranquility to the questions before you and you had treated the matter with painstaking and indefatigable industry, combined with that knowledge and that application of knowledge by a well trained and well balanced mind without which even industry itself may be futile. Of

> all your decisions there has been only one that has given universal dissatisfaction, and that has been your decision to retire.

It was with the thanks and appreciation of the legal profession still ringing in his ears that Sir David, with many years of active life ahead, retired from the Supreme Court Bench on 31 May 1948 at the age of 60. One career had ended, but another was to begin.

> I am not retiring from the Bench Sir David then said because I have reached the age limit but because I have never looked upon the law as being the whole of life. During the last few years I have been interested in university education. There has been a good deal to do.

After a brief term, following his reappointment as a temporary Judge in 1949, Sir David finally stood down in 1950. And for the next 33 years, for the retired Judge, still in the prime of his intellect and physically active, there was much to do. What he did and how well he did it is for others to relate.

I am requested on this occasion to associate with this tribute all Judges of the Court of Appeal and of the High Court sitting with me today, together with all other Judges of these Courts who are unable to be present. I also associate the retired Judges of the Court of Appeal who are present on the bench, and Sir Thaddeus McCarthy, also a retired Judge of the Court of Appeal, who is unable to be present.

To Sir David's family — his son and his daughter — I extend our sympathy in the loss of their father and friend. I know however that you will, with pride, share with us these memories of a loved and honoured Judge.

May it please Your Honours

I have the privilege and honour of appearing on behalf of the Law Society of New Zealand to pay that Society's final tribute to the life and work of a great Judge and a great New Zealander.

This is the Courtroom, these are the very walls and surroundings, in which were enacted his forensic triumphs when at the Bar, and in which later he made the greater part of his calm orderly and deliberate contribution to our law as a Judge of the Supreme Court and the Court of Appeal, which in his time sat in these precincts.

It is of course more than thirty years since His Honour sat here as a Judge from which inevitably if follows that many of those present today could not have appeared in Court before him. But there is no one here unaware of his memory and his fame as a Judge and few who have not shared practically in the legacy he left to us in his recorded judgments.

His physical presence is familiar to all of us because of the active role he chose to play in public affairs after his retirement, his moving contributions to our District Law Society Centenary remembrances, and not least by his frequent attendances among Your Honours' retired brethren in this Courtroom on ceremonial occassions. On one of the most recent of these, the swearing in of His Honour Mr Justice Eichelbaum when Sir David was prevented by his infirmities from attending the Court, he sent a heartwarming letter which Your Honour the Chief Justice read out to the assembly in such a way that the Judge's presence was certainly felt here again. It struck a particularly poignant note for those who knew the old Judge and the new one, and reflected on times past and time to come.

It is right and proper that the Wellington District Law Society (whose President Mr Gendall will follow me) should claim the late Judge as their own and make particular reference to the Wellington connection. Because his whole professional life before his appointment to the Bench was passed here, first in his training days at Findlay Dalziell & Co and then as a principal in Morison Smith & Co Mr Gendall will forgive me for observing that the late Judge must have marvelled, indeed rejoiced, at the development in these latter days of the firms that still bear elements of those honoured names, to the point where in our time with their various ramifications they bid fair to cover the metroplis (if not the waterfront).

I will make brief reference to New Zealand matters but first I must mention that born, as the Solicitor-General has told us, in Dunedin in February 1888, His Honour was a son of the Manse and brought up under the strict codes of ethical belief and behaviour which those surroundings connoted. They moulded his character as one would expect and he was a determined pursuer of truth and justice and a firm upholder of them to the end. In his contribution to Sir Robin Cooke's *"Portrait of a Profession"* — our Centennial Book — he told the story of reporting to Sir Charles Skerrett that the outcome of some research seemed to lead to an unfair result, whereupon that redoubtable Judge retorted "You had better look again. If the result is unfair it is probably wrong." The dictum was Skerrett's but there is clear evidence that Mr Justice Smith adopted it as a rule of his own.

At the Bar his firm's connections led him mainly in the way of civil and commercial litigation and it is evident that he presented his cases with painstaking thoroughness and great power. His firm had a Maori land law practice, and this eventually led him to a notable brief on behalf of the Maori interests before the Royal Committee, as it was called, of 1927 to inquire into the confiscation of Maori lands following the Maori Wars of last century. That brief, huge as it was, he carried with masterly control to a successful conclusion. The mana that he acquired thereby in most areas of Maoridom, if not in all was great and lasting.

In his writings His Honour expressed the belief that it was his conduct of that case which really led to the offer of appointment to the Bench at the age of forty years. However that may be, certainly he went to the Bench at the height of his powers. He was appointed on the 26th of April 1928, three months after his close friend, Archie Blair, and being himself just 40 years and 2 months, the second youngest Judge ever to be appointed to the Supreme Court at that time. Only Sir Joshua Williams was younger, at 38, but that was 53 years previously, in 1875.

He was immediately flung into the crucible of the May Criminal Sessions in this Court, he having conducted only two criminal cases before (with as he said, a 50 percent success rate). From that ordeal by fire he emerged unscathed only to be "pitchforked" as he put it into the Court of Appeal. We may suspect that he felt a little more comfortable in that slightly less boisterous forum.

The truth is, I believe, that he loved and enjoyed all classes of judicial work and that by intellectual capacity, physical energy and above all temperament, he was admirably qualified to perform it.

This was shown when he was sent still as a very new Judge to be a resident Judge at Auckland, where for 4½ years with his brother Herdman

he coped day in day out year in year out with the long lists of sessional cases and banco work of that enormously busy area. He wrote that he got on well with Herdman J and enjoyed the work, but the sensation persists across the years that he was not unreservedly devoted to that heretical Northern City and that he longed at times to return to the peaceof the Old Wadestown Road.

This he was able to do in 1934 when he came back as a resident Judge at Wellington. He returned to Wadestown, not to the same property but to Wadestown at least, and there he resided for the remainder of his life, another 48 years.

In the year of his return to Wellington he was Chairman of the Royal Commission to investigate Maori Affairs, and in 1937 it fell to his lot to decide at first instance the case of *Te Heuheu Tukino v The Aotea District Maori Land Board,* the case in which at the appellate stages in the Court of Appeal and in the Privy Council the appellant sought to rely upon provisions of the Treaty of Waitangi as enforceable as part of the municipal law. Inevitably this courageous but ill-founded proposition was firmly dismissed by the Court of Appeal and the Judicial Committee and the judgment of Smith J at first instance was affirmed, though he in fact did not have to pass upon the Treaty argument as it was never raised in the supreme Court. It is known that His Honour took the closest interest in that argument as it developed in the Court of Appeal and the Privy Council and in recent years when the controversies about the Treaty arose again in all their vigour he must often have looked back in memory to those days of fierce debate more than 40 years ago.

In many fields other than the law he gave unstinting service. He was a soldier in the first World War and was on the executive of the RSA and indeed Chairman of it afterwards. In 1933 he had the rare honour of appointment by the United States Government as its non-national member of an international commission established by treaty in 1914 to settle questions of war and peace between Chile and Peru. He was a member of the Council of Victoria University College from 1939 to 1945, and he was Chancellor of the University of New Zealand from 1945 to 1961. In 1945-46 he was Chairman of the Royal Commission on Licensing, in 1950 he was made Chairman of the New Zealand Board of Trade and served in that capacity for nine years, and from 1948 to 1970, a period of 22 years, he was on the board of the United States Educational Foundation in New Zealand. For his services to University Education he received the honorary degree of Doctor of Civil Law in the University of Oxford, and an honorary Doctor of Laws from the University of New Zealand in 1961. He guided and attained presidential rank in a large number of voluntary and charitable associations. He died full of years and honours in the very last days of December last, aged 94 years and only a month and a few days short of his 95th birthday.

It was a full and remarkable life of which it must be truly said that he deserved well of his country in all his fields of endeavour. His former associate Lord Grey writing recently said "Whatever he did, and he did many and varied things of importance — he did with principle, sincerity and all his might". But central to it, at the core of it all, was his devotion to the law, which he held to the end.

To those of his family who remain, to his children who remember him as a kind and loving parent always, and who grew up under his guidance as honoured professionals in our city, the New Zealand Law Society offers no sentiments of grief at the close of this wonderful life; but rather the assurance of our pride, our gratitude and our tribute of honour for all he achieved for our people and the nation.

THE Wellington District Law Society is honoured to join in this tribute to the Hon Sir David Smith, who was so much a Wellington man, practitioner and Judge. Apart from a period of six years, when, as is sometimes the custom even today, new Judges are sent to parts North, Sir David lived, practised and served on the Bench in Wellington since the turn of the century. In 1904 he came to the city from the South Island to attend Wellington College, and subsequently Victoria University. At that time he served as a law clerk to Sir John Findlay in the firm of Findlay, Dalziell & Co, now known as "Buddle Findlay". Of course that has very special significance for me.

He became a senior partner in the firm of Morison, Smith & Morison, and at the young age of 40 was appointed to the Supreme Court Bench in 1928. There has only been one younger Judge ever appointed and Sir David was known affectionately at that time as "The Boy Judge". I am told by those who knew him that he was an outstanding Judge, man of great principles and sincerity, and a gentleman in every sense of the word. His wide interests dispelled any opinion that Judges were only men of the law. He was a humanitarian, with real concern for people — which he expressed not only in words. He was first President of the Crippled Children's Society, President of the Heritage Organisation and of Wellington Rotary, as well as Chancellor of the University of New Zealand — positions which he held during as well as after his retirement from the Bench in 1948.

Sir David had a way of engaging associates who later achieved great distinction in their own right. Unquestionably he played a significant part in their training and was rightly proud of their success. They included, in 1928, Mr Ian Macarthur, who later became Mr Justice Macarthur. Sir David's second associate was Mr Ralph Grey — later to become Governor of Northern Ireland and Lord Grey of Naunton. Sir David anticipated the equal opportunities legislation by engaging a woman associate during the war — she being only the second woman to be so engaged. Her name was Fiona Macarthur — his sister and the stepmother of Sir David's first associate. She is now Mrs McLean-Smith, and she is in Court today. Her presence speaks more of the man and the esteem in which he was held, than do any words that I can say.

The service that Sir David gave to Wellington in its widest sense, through his legal, judicial and other interests was immense. It did not cease upon his retirement in 1948 as he constantly kept in touch with the profession, sharing with it, with great wit and charm. His contribution to *"Portrait of a Profession"* and articles written on law and lawyers in Wellington have enabled us to share with him his life in the law in those days with Sir Charles Skerrett, Sir Francis Bell, Sir Michael Myers and others who were his contemporaries. The knowledge and pleasure he has given us by those contributions remain as permanent reminders of him.

Continued on p 128

Interim Injuctions — A practitioner's guide

by R L Towner, an Auckland lawyer

Interim injunctions require a series of steps to be taken by common law solicitors usually on an urgent basis. In this article the author sets out a practical guide to assist practitioners in these tasks.

1 Introduction

The interim injunction is an equitable remedy the object of which is to prevent the infliction of irreparable harm through unlawful interference with a person's rights pending the final determination of the dispute at a full trial. The hearing of the application for the temporary injunction is *not* a trial on the merits as normally the motion will be determined on affidavit evidence without the defendant having filed a statement of defence and without the benefit of interlocutory procedures; this is particularly so after *American Cyanamid Company v Ethicon Ltd* [1975] 1 All ER 504.

It should be noted that in England a clear distinction is made between "interlocutory" injunctions and "interim" injunctions. Whereas the former restrains a defendant until the final hearing (or further order), the latter restrains a defendant only until a specified date (or further order). An interim injunction contemplates the plaintiff applying to the Court by the named date for an interlocutory injunction effective pending trial. Although RR 468B and 468C of our Code of Civil Procedure (concerning the plaintiff's undertaking as to damages) make express reference to both interlocutory and interim orders, it seems that in New Zealand the tendency is to use the expressions interchangeably. The description "interim injunction" will be used in a general sense by the author as this would appear to be the more accepted practice in this country.

The significance of the outcome of interim injunction proceedings to a client's interests must be appreciated at all times. The High Court grants far more interim injunctions each year than perpetual injunctions, and Lord Denning MR has underscored the importance of interim injunction proceedings in *Fellowes & Son v Fisher* [1976] QB 122.

> Nearly always, however, these cases do not go to trial. The parties accept the prima facie view or settle the case. At any rate in 99 cases out of 100 it goes no further. (p 129)

2 Receiving instructions

If you are receiving instructions to obtain an interim injunction, it will normally be useful to act on the following points:

(i) Ascertain how urgently the client requires protection so as to make a decision whether to apply ex parte (see below);

(ii) Explain to the client the significance of the undertaking as to damages required under R 468B. If an interim injunction is obtained, but subsequently the case goes to trial and the plaintiff fails to obtain a perpetual order, the defendant will meantime have been restrained improperly and will be entitled to damages for any loss he has suffered. Such damages could be quite substantial (eg loss of business profits over an extended period);

(iii) Ensure that you obtain the necessary financial information to properly substantiate the undertaking in the supporting affidavit(s);

(iv) Explain that no matter how strong a client's case may be, the Court will usually refuse to grant the interim injunction if damages would be an adequate remedy and the defendant would be able to pay damages;

(v) Interim injunction proceedings are normally costly, and often extremely expensive, notwithstanding that they may be resolved within a matter of weeks — make sure the client appreciates the nature and extent of the work involved.

3 Documents

The following documents will need to be filed:

(i) *Warrant to sue*/Declaration of authority to act;

(ii) *Writ with statement of claim* — In a case of real urgency, proceedings may be initiated without a writ having issued or even without the filing of any papers (on the giving of an undertaking to the Judge that papers will be filed immediately). It would always assist the Court (and certainly the client's case) if at least a draft statement of claim can be presented to the Court;

(iii) *Notice of motion* (either on notice or ex parte);

(iv) *Affidavit(s) in support of the notice of motion* — The affidavit should cover the nature of the claim against the defendant, the reasons why it is necessary to obtain an interim injunction and financial information to support the undertaking as to damages. Evidence relevant to a company's ability to pay damages includes: amount of shareholders' funds, annual turnover, total company assets and net profit for the latest financial year. If the plaintiff is

an individual, ascertain his or her assets and income, and exhibit appropriate documentation (letter from employer, recent property valuation and car registration papers). Note that statements as to the deponent's *belief*, with the grounds thereof, may be admitted as evidence pursuant to R 185.

(v) *Undertaking as to damages* — There is no prescribed form for the undertaking, and reference should be made to the wording in R 468B and available office precedents. The undertaking must be signed by the plaintiff. Also note R 468C where an order is drawn up without containing the undertaking required by R 468B. If your client is a subsidiary company consider the possibility of providing a guarantee by the holding or parent company in the following form which can follow on in the same document after the plaintiff's undertaking:

B a duly incorporated company having its registered office at Auckland *HEREBY GUARANTEES* the due observance and performance of the above undertaking by *A*.

This technique was used recently in *Probe Publications Ltd v Profile Communications Ltd* (Unreported High Court, Auckland (A 318/81) 27 May 1981), and in his judgment Chilwell J accepted the worth of the undertaking on the basis of the guarantee — "It is undisputed that that guarantee is worth a million dollars." Obviously evidence as to the financial position of the parent company must be deposed to in the affidavits.

(vi) *Draft order* — The objective of the proceedings is to obtain, seal and serve the order as quickly as possible. Refer to R 422 and Form 33G in Schedule 1 of the Code.

(vii) *Memorandum* to the Judge (when proceeding ex parte).

4 Applying ex parte

Rule 400(1)(a) governs the circumstances in which an interim injunction may be obtained ex parte — the Court must be satisfied that, "the *delay* that would be caused by proceeding on notice would or might entail *irreparable injury*". There seems to be an understandable judicial reluctance to grant interim injunctions on an ex parte basis if it is at all possible to proceed on notice. The applicant must demonstrate to the Court that he needs the Court's protection immediately, and promptness is essential for if the plaintiff has delayed with knowledge of the facts before coming to the Court, the injunction will probably be refused.[1] Examples of when an ex parte application might be appropriate include: the sale of a property; the demolition of a building; or the threat of an unlawful industrial strike.

The normal rules applying to ex parte applications apply: the notice of motion must be certified (R 403); the solicitor has his responsibilities under R 405 to personally satisfy himself that the papers are in order and that the order applied for ought to be made as well as for the regularity of the papers. Generally it will not be necessary to appear on the notice of motion (R 414). However, you should discuss the application with the Registrar/Deputy Registrar of the Court to ensure that it is placed before a Judge as quickly as possible. The plaintiff's solicitor should be available to attend Court on short notice as a Judge may want to see him in Chambers.

It is the duty of the solicitor certifying to an ex parte application to make the fullest disclosure to the Court of all matters relevant to the application whether or not he considers any such matter unimportant. In particular, when moving ex parte for an interim injunction in an action, he has a duty to disclose to the court the possible defence to the action, if he knows it, and the facts on which it is based. Failure to do so may *in itself* furnish the ground for rescinding the injunction.[2]

Rule 400 is subject to R 426, and hence the party against whom an ex parte interim injunction has been made may apply *at any time* to vary or rescind the order. Delay by the defendant in applying for variation or rescission will likely be relevant to the exercise of the Court's discretion. It would seem that the 7-day time requirement in R 426A pertaining to applications to vary or rescind orders made in Chambers or in Court for Chambers does not apply to ex parte orders as R 426A(2) is "subject to the provisions of Rule 426".

An application to discharge an ex parte interim injunction has the character of an application for a rehearing, and the Court may deal with the injunction de novo.[3] Accordingly, if you are acting for a client against whom an interlocutory injunction has been obtained ex parte, assess whether damages would be an adequate remedy for the plaintiff and if so whether your client is in a position to pay damages. You may conclude that an interim injunction should not have issued and that an application to rescind the injunction would be in order.

One of the dangers of applying ex parte is in placing sole reliance on the evidence of one's own client; this leaves open the possibility of a subsequent application by the defendant for rescission. If there is doubt as to whether the circumstances fall within R 400(1)(a), an alternative approach is to apply on notice while at the same time extracting an undertaking from the defendant's solicitor that the defendant will not take any steps pending the Court hearing. A further alternative is to apply ex parte but immediately notify the defendant's solicitor, particularly if he is a local practitioner; this step will surely be appreciated by a Judge who may wish to hear informally from the defendant's solicitor in Chambers.

5 Legal Principles

The question of the proper legal test to be applied in New Zealand in granting an interim injunction has now been resolved by the Privy Council in *Eng Mee Young v Letchumanan* [1980] AC 331:

> The guiding principle in granting an interlocutory injunction is the balance of convenience; there is no requirement that before an interlocutory injunction is granted the plaintiff should satisfy the Court that there is a "probability", a "prima facie case" or a "strong prima facie case" that if the action goes to trial he will succeed; but before any question of balance of convenience can arise the parties seeking the injunction must satisfy the Court that his claim is neither frivolous nor vexatious; in other words, that the evidence before the Court discloses that there is a serious question to be tried: *American Cyanamid Company v Ethicon Limited* [1975] AC 396. (p 337).

This adoption by the Privy Council of the principles enunciated by Lord Diplock in the *American Cyanamid* case has now been cited with approval by

the New Zealand Court of Appeal in *Consolidated Traders Ltd v Downes* [1981] 2 NZLR 247. Earlier recognition of the application of the principles in New Zealand was given by the Court of Appeal in *Congoleum Corporation v Poly-Flor Products (NZ) Ltd* [1979] 2 NZLR 561.

The factors to be considered in the determination of the balance of convenience (as pronounced by Lord Diplock) may be summarised as follows:

(i) There should be *no* interim injunction if the defendant will be able to pay sufficient damages to compensate the plaintiff for any loss he may suffer;

(ii) If damages would not properly compensate the plaintiff, the court should see whether the defendant will be properly protected by the plaintiff's undertaking to pay damages. If the plaintiff's undertaking is sound there is then no reason to decline to give an injunction;

(iii) If the plaintiff's undertaking is suspect or if the defendant's ability to pay is suspect, the Court should *then* consider where the balance of convenience lies;

(iv) When the factors are evenly balanced it is usually wise to preserve the status quo;

(v) The extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his succeeding at trial is always a significant factor in assessing where the balance of convenience lies;

(vi) If the parties' cases are evenly balanced "it may not be improper to take into account in tipping the balance, the relative strength of each party's case as revealed by the affidavit evidence", but the Court can only act on this factor where there is "no credible dispute that the strength of one party's case is disproportionate to that of the other party"; and

(vii) In addition to the above factors, there may be many other special factors to be taken into consideration in the particular circumstances of individual cases.

A similar summary of the *American Cyanamid* considerations was provided by Browne LJ in *Fellowes & Son v Fisher* [1976] QB 122. This judgment has been adopted by a number of New Zealand Judges in recent decisions.[4]

Although it would appear from the above formulation that the relative strengths of the party's cases are only to be considered as a last resort, it is only natural that Judges will continue to be influenced by their perception of the merits of the case. It follows that extreme care should be taken in preparing the affidavit(s) whether you are acting for the plaintiff or the defendant, and the cause(s) of action or defence(s) should be fully set out in legal submissions.

The outcome of proceedings for an interim injunction will often depend upon the adequacy of damages as an alternative remedy. If you act for the plaintiff consider the following points:

(i) The difficulty of assessing damages.[5] Usually harm to the goodwill of an established business is regarded as not readily quantifiable;

(ii) the general inadequacy of damages as an alternative remedy; for example, in the recent *Lintas* case Holland J stated:

> In the case of the plaintiff, I am satisfied that not only would the damages be difficult to assess, but they would be an inadequate remedy. A substantial element of the damages would be the loss of the plaintiff's right to endeavour to retain the custom of the firms concerned. Unless an interlocutory injunction is granted, it would appear that that custom will inevitably be lost. It is submitted by Mr Henry that there is no evidence to indicate that even if an injunction is granted, any of the customers of the plaintiff will return to it. That may be so, it may equally not be so, at present it is a matter of speculation. I am satisfied that the plaintiff should have the right of endeavouring to retain its business. (p 22)

(iii) Any inability of the defendant to eventually pay damages. There is an onus on the defendant to adduce evidence of its ability to pay damages,[6] and the absence of relevant financial information in the defendant's affidavits should be emphasised to the Court. Ensure that the plaintiff's own financial position is deposed to in order to support the undertaking as to damages.

Obviously the converse points should be considered by counsel for a defendant. Basically the argument is that damages can be assessed, would adequately compensate the plaintiff for any loss he may suffer and could be paid by the defendant. The plaintiff's failure to depose as to its ability to pay damages may be fatal to its case.[7] An exception is an application to restrain a mortgagee's sale where the Court will grant an interim injunction, even to an impecunious mortgagor, if the grounds for relief are established.[8]

In determining the question of balance of convenience, the Court is entitled to look at the prospective hardship to both the plaintiff and the defendant. Spry deals with the question of hardship to the defendant as follows:[9]

> . . . it must not be thought that the defendant, by showing the prospect of even serious hardship if an interlocutory injunction issues against him, will induce a Court of equity to refuse to grant an interlocutory injunction if there are countervailing matters of great weight. Hardship is no more than a discretionary consideration, which has more or less weight in the light of other considerations such as degree of probability that the threatened acts in question would, if they took place, be wrongful. (pp 439-440)

The interrelation of hardship and a party's conduct is also addressed:

> The preferable view, however, is that considerations of hardship on the part of the defendant are never to be disregarded, although the weight to be attributed to them will often be found to be considerably reduced in view of other circumstances such as the fact that the acts in question are clearly wrongful or that he has been wantonly or recklessly acting in disregard of the rights of the plaintiff. (p 44)

This latter principle has received recent judicial recognition in New Zealand. One useful example is *NZ Farmer's Co-operative Association of Canterbury Ltd*

v Farmer's Trading Company Ltd (Unreported, High Court, Christchurch (A 496/78), 15 February 1979), in which Chilwell J stated:

> In my judgment it is idle for the defendants to come to this Court and plead "We have done it; it is irreversible; it has been done at great expense. We are now sorry. To make us undo the prima facie wrong to the plaintiff will cost us dearly". A similar argument was advanced in the *Gallagher* case. It failed. The reason is simply this. A defendant cannot create his own inconvenience and then have it taken into account in balancing the scales of convenience — at least not when he embarks on the questionable conduct with his eyes open.

A further matter relevant to the balance of convenience is the extent to which the respective businesses of the parties are established. Spry states:

> Often, for example, the balance of convenience is found to depend upon the extent to which the respective businesses of the parties are established and upon the effect on their respective goodwills of the various orders which it is open to the Court to make. (p 445)

In the *Lintas* case the defendants made the submission that the effect of an interim injunction restricting them from servicing the customers of the plaintiff would effectively cancel their business and put them and their employees out of work. Holland J noted in his judgment that if the order had those consquences then the defendants "who acted in such a high-handed and speedy manner without any apparent consideration for the plaintiff, brought the situation upon themselves".

In the *Probe Publications* case Chilwell J recognised that the plaintiff was an established business and that the first defendant was just starting out in business and that it might be that any injunction of sufficient use to the plaintiff would effectively put the first defendant out of business. However, Chilwell J stated that this was a case in which the defendants had acted "deliberately" and had gone into the whole matter "with eyes open".

On the other hand, a defendant in a breach of confidence/fiduciary duty case may want to appeal to the free enterprise ethic reflected in the following words of Lord Scarman in *Cadbury Schweppes Pty Ltd v Pub Squash Co Pty Ltd* [1981] 1 All ER 212.

> But competition must remain free; and competition is safeguarded by the necessity for the plaintiff to prove that he has built up an "intangible property right" in the advertised descriptions of his product, or, in other words, that he has succeeded by such methods in giving his product a distinctive character accepted by the market. A defendant, however, does no wrong by entering a market created by another and there competing with its creator. The line may be difficult to draw; but, unless it is drawn, competition will be stifled. (p 218)

The preservation of the status quo will normally favour the plaintiff and is, therefore, an additional matter which counsel for the plaintiff should note in his submissions. Although the judgment of Lord Diplock in the *American Cyanamid* case does not specify the status quo which is to be preserved or the relevant time at which to assess the status quo, it appears to be generally accepted that the status quo is that which pertains *before* the questionable conduct was implemented or commenced. This approach clearly favours the plaintiff.

Finally, it must be remembered that an interim injunction is an equitable remedy and that matters such as the acquiescence by the plaintiff in the defendant's conduct or improper delay by the plaintiff in applying to the Court will be material.[10]

6 Modification of American Cyanamid Principles

There are a number of situations in which the principles outlined in *American Cyanamid* do not apply. First of all, there may be no material dispute about the facts — for example where the sole argument involves a legal question as to whether the defendant is acting *ultra vires* — in which case the Judge can be expected to rule on the question of law.

(i) Mandatory interim injunctions

It is clear that there is jurisdiction to make such orders. Accordingly, if on an interim application it appears that the plaintiff may suffer considerable hardship or inconvenience if the defendant does not immediately take steps to undo the consequences or wrongful acts and to restore an earlier position, a mandatory injunction may issue at once in the absence of sufficient countervailing considerations.

However, it will normally be necessary for the applicant to show a strong *prima facie* case, and recently the English Court of Appeal confirmed that the *American Cyanamid* principles were of no relevance in this type of case.[11] The stronger the case of the plaintiff that the matters complained of are unlawful, the more likely it is that it will be found to be just and equitable that its interests be protected by the immediate issue of an interim injunction. Other matters of particular importance are, on the one hand, the ease or difficulty with which there can be compliance with the mandatory order and the extent of hardship which compliance will cause the defendant and, on the other hand, the nature of the injury and inconvenience which would be caused to the plaintiff if it did not obtain protection at once. In some circumstances, it may be possible to describe a mandatory injunction ("the defendant shall comply") as a prohibitory injunction ("the defendant shall not infringe").[12]

(ii) Winding-up petitions

Another situation in which the "arguable case" test does not apply is with applications to prevent the presentation and advertisement of winding-up petitions.[13] In this case a plaintiff must satisfy the Court either that it *genuinely* disputes the debt upon which the s 128 notice is based or that it has a claim for damages based on *substantial grounds* which exceeds the amount of the debt claimed to be owing in the s 218 notice. Here the issue for the Court is to determine whether there is in existence a "genuine" dispute or a *bona fide* "counterclaim" based on "substantial grounds". In the latter case the Court will scrutinise the affidavits in support of the application to assess whether there are substantial grounds upon which the "counterclaim" of the plaintiff against the defendant is based.[14]

Obviously such proceedings must be litigated promptly, and there is also an onus on an applicant company to satisfy the Court that it is solvent and in a position to pay its debts.

Accordingly, if you are acting for a plaintiff in such a case, spell out in full in the affidavits the grounds upon which the larger claim against the defendant is based. Furthermore, do not overlook including detailed financial information

in the affidavits relating to the company's "solvency" (ie its actual ability to pay its debts as they fall due and not merely balance sheet figures).

If you receive instructions to restrain the presentation of a winding-up petition solely on the basis that the debt is genuinely disputed, it is possible and perhaps more convenient to apply by way of originating application supported by affidavit which obviates the need for a writ and statement of claim. In either case seek the undertaking of the defendant's solicitor that he will not present the petition until the injunction application is decided.

(iii) Defamation

As to the imminent publication of alleged defamatory material, it was recognised in *McSweeney v Berryman* [1980] 2 NZLR 168, that the Court's jurisdiction to restrain the publication of a threatened libel will only be rarely exercised. As a matter of principle an interim injunction will not be granted in respect of a libel when the defendant intends to raise a defence of justification or when he claims qualified privilege, unless the plaintiff can show malice in that the defendant intends to publish what he knows to be untrue.[15]

(iii) Credit Contracts Act 1981

A further exception to *American Cyanamid* may be proceedings based on the Credit Contracts Act 1981. The Court has power under s 10(1) to re-open credit contracts on a number of grounds relating to "oppressive" terms or conduct, and it is possible for a party to a credit contract to seek to restrain the exercise of powers under a credit contract on these grounds. In refusing an injunction in *Dennis Hedley Ltd v Freefit Mufflers Ltd* (unreported, High Court, Auckland (A 732/82) 6 August 1982) Holland J held that the "arguable case" test was not applicable. Rather the plaintiff had a clear onus to satisfy the Court on the affidavits that "the intended exercise by the defendant of the power conferred by the debenture is being performed or is about to be performed in an oppressive manner" No rationale for this departure from the *American Cyanamid* principle is articulated in the judgment, and it remains to be seen whether the approach of Holland J will be confirmed.

(v) Industrial injunctions

Special considerations also apply to interim injunctions in the industrial context. First of all, as noted recently by Barker J, "the injunctive jurisdiction of the [High] Court has certain limitations where the interpretation of industrial awards is directly in issue."[16] Secondly, an employer (normally the plaintiff) must always be conscious of the reality that the obtaining of an interim injunction from the High Court may exacerbate rather than resolve industrial conflict. Thirdly, an employer seeking to restrain industrial action affecting his business will normally rely upon the economic torts of conspiracy, interference with contractual relations and intimidation. Breach of either s 125 of the Industrial Relations Act 1973 or s 119B of the Commerce Act 1975 may also be a sufficient cause of action.[17]

If an employer can raise a serious question to be tried,[18] normally the balance of convenience will favour the grant of the injunction. A company affected by prolonged industrial action may not be able to assess its loss and be adequately compensated by damages. Any inability of a defendant union to pay damages will be a "material factor". The relative hardship suffered by the company as against that suffered by the union may also tip the balance further.

7 Standing for an interlocutory injunction

Although the standing of a plaintiff will not normally be an issue in proceedings for an interim injunction, it may become relevant where, for example, the plaintiff applies to restrain the defendant from commencing a business or other proposed land use which appears to be contrary to a District Scheme and the local authority is itself reluctant to take steps against the defendant. The position is that the Court has a discretion as to whether to examine a plaintiff's standing at an interlocutory stage of proceedings, and generally the Court will not enter into a close scrutiny of the plaintiff's standing at this point in the litigation.

Provided that the plaintiff can establish a *prima facie* or arguable case for standing, he will have the capacity to obtain interim relief. The question of standing will normally be conclusively decided at the hearing on merits of the claim.[19] In the town planning context Cooke J stated in *Locke v Avon Motor Launch Limited* (1973) 4 NZTPA 17:

> In so far as the question is aimed at the stage at which a ruling on status, if in issue, should be given I would add that where status is in doubt it will generally be inadvisable to determine that issue until all the evidence and submissions have been heard. (p 20)

The Court of Appeal accepted (without expressing a final view on the point) in *Shoprite Food Stores (1973) Limited v Foodstuffs (Auckland) Limited* (unreported High Court of Appeal 5 February 1981 (CA 125/80) that the plaintiff need only establish an arguable case at the interim stage.

Accordingly, if you act for a plaintiff in such circumstances, cite to the Court the more modern and less restrictive standing requirements for an injunction (see, for example, the judgment of Gibbs J in the *Australian Conservtion Foundation* case) and then make the submision that the plaintiff has, at least, an arguable case establishing a "special interest" in the defendant's actions (for instance, as a trade competitor).

8 Form and clarity of injunction

Any injunction should of course be in as definite, clear and precise terms as possible.[20] At the same time, however, the Courts have readily accepted that an injunction may be granted in extensive terms if adequate protection cannot be given to the plaintiff in any other way. This was noted by Fair J in *Cook v Doyle* [1946] NZLR 398. Other judges have rejected the argument of uncertainty where there has been merit in the plaintiff's claim and the injunction has been framed as precisely as possible in the circumstances. For example, in *Hampstead and Suburban Properties Limited v Diomedous* [1969] 1 Ch 248, 257, Megarry J (as he then was) stated, "the Court is always slow to repose on the easy pillow of uncertainty."

If, on the other hand, the Court takes the view that the terms of the injunction are more general than are warranted in the circumstances, there is ample authority that the terms of an injunction can be modified by an appellate Court which considers that an injunction should issue in the circumstances. In a number of decisions Courts have had no hesitation in amending the terms of an injunction as the plaintiff had a meritorious claim.[21]

9 Miscellaneous points

(i) Discontinuance by plaintiff *Where a plaintiff has obtained an interim injunction on the usual undertaking as to damages but subsequently*

discontinues the action under R 238, the Court retains its jurisdiction to inquire as to what damage the defendant may have suffered; in Newcomen v Coulson (1878) 7 Ch D 746 an inquiry as to damages was granted notwithstanding that the application was made some 11 months after the discontinuance.

(ii) Proceedings Against the Crown

Interim injunctions cannot issue against the Crown as s 17(1)(a) of the Crown Proceedings Act 1950 prohibits the Court from issuing injunctions against the Crown. Instead the Court is empowered under that section to "make an order declaratory of the rights of the parties". Subsection (2) purports to ensure the completeness of the immunity by prohibiting the Court from granting an injunction against "an officer of the Crown if the effect of granting the injunction . . . would be to give any relief against the Crown which would not have been obtained in proceedings against the Crown." An "interim declaration" does not exist as a temporary remedy against the Crown.[22]

Interim relief against the Crown can only be obtained pursuant to s 8 of the Judicature Amendment Act 1972 which authorises the Court to issue an "interim order" pending the hearing and determination of an application for review. It should be noted that under s 8(2), where the Crown is the respondent to the application for review, the Court may only declare that the Crown "ought not to take any further action that is or would be consequential on the exercise of the statutory power". An important aspect of s 8 is that such interim orders cannot be obtained to *prohibit* the actual exercise of a statutory power but rather one can only prohibit the respondent from taking any further action that is or would be consequential on the exercise of the statutory power.[23]

(iii) Undertakings

The occasion may arise when counsel may want to consider resolving a dispute by means of an undertaking given in Court; for example, counsel for a plaintiff may sense that a Judge is not overly sympathetic to his client's case but that the defendant is willing to voluntarily give an undertaking. Such an undertaking is equivalent to an injunction with respect to enforcement. It cannot be varied, although a defendant can seek the same result by an application for release followed by the giving of a fresh undertaking in different terms.[24] A party which freely gives an undertaking will be subsequently released from it only if there has been a significant change of circumstances or new facts have been discovered which render enforcement of the undertaking unjust.[25]

(iv) Appeals

If a High Court Judge refuses to grant an interim injunction, there is of course a right of appeal to the Court of Appeal. However, the plaintiff must either apply in the High Court for an interim injunction pending the determination of the appeal or else obtain an undertaking that the defendant will not take any steps until the appeal is heard. Normally the Court should not refuse an interim injunction if the refusal would render an intended right of appeal nugatory, but such an injunction may in some circumstances be granted only subject to strict conditions.[26]

On any appeal from the grant or refusal of an interim injunction, the function of the Court of Appeal is not to exercise an independent discretion. It must defer to the Judge's exercise of his discretion and must not interfere with it merely because it would have exercised the discretion differently. It is only if and after the Court of Appeal has concluded that the Judge's exercise of his discretion *must* be set aside that it becomes entitled to exercise an original discretion of its own.[27]

(v) District Court

The District Court also has jurisdiction to grant injunctions and interim injunctions. However, it may do so only in its ancillary jurisdiction under s 41 of the District Courts Act 1947 in actions within its jurisdiction and only where a substantial part of the claim is a money claim within the jurisdiction of the Court. Interim injunctions are specifically dealt with in R 149 of the District Court Rules 1948, and reference should also be made to s 42 of the Act and R 207 relating to injunctions generally.

9 Conclusion

Although applications for interim injunctions can come before the Court in a variety of circumstances, there are a number of common procedures to be followed, papers to be filed, and legal principles to be applied. All common law lawyers should acquaint themselves with the principles set out by Lord Diplock in his judgment in the *American Cyanamid* case and appreciate the practical consequences which flow from those principles (and the exceptions thereto). Finally, the diligent collection of and appropriate reliance on office precedents can greatly facilitate the expeditious filing of documents in Court.

1 *Bates v Lord Hailsham* [1972] 1 WLR 1373.
2 *United Peoples Organisation (Worldwide) Incorporated v Rakino Farms Ltd (No 1)* [1964] NZLR 737.
3 *Carter Holt Holdings Ltd v Fletcher Holdings Ltd* [1980] 2 NZLR 80.
4 See also *Sutton v The House of Running Ltd* [1979] 2 NZLR 750, 752 per Somers J.
5 SSC & B Lintas New Zealand Ltd v Murphy (Auckland, A966/81, 14 October 1981); *Montana Wines Ltd v Cooks New Zealand Wine Company Ltd* (Auckland, A 353/79, 11 April 1979).
6 *Hubbard v Pitt* [1976] 2 QB 142, 189.
7 For example, see *Coastal Shipping Ltd v Auckland Harbour Board* (Auckland Registry, A260/82, 7 April 1982); *NZ Shop Employees Industrial Association of Workers v Foodtown Supermarkets Ltd* (Auckland, A 1348/82, 16 December 1982).
8 See Hinde, *Land Law* (1979), para 8.124, and *First Supplement*, pp 59-60; [1982] NZLJ 241.
9 *The Principles of Equitable Remedies* (2nd ed).
10 *24 Halsbury's Laws of England* (4th ed), paras 958-962; *NZ Shop Employees v Foodtown, supra.*
11 *De Falco v Crowley BC* [1980] 1 All ER 912.
12 See *Nesdale v B H Manning Holdings Ltd* (Auckland, A 1245/75, 22 August 1975).
13 See generally Calnan, *The Effect of Disputed Debts, Set Offs and Counterclaims on Winding-up and Bankruptcy Petitions* (1981) Legal Research Foundation Inc; Barton, "Law Relating to Disputed Indebtedness Where the Winding-up of a Company is Sought on the Ground of Inability to Pay Debts", 9 ABLR 95.
14 For example, *Universal Chemicals Ltd v Hayton* [1980] 2 NZLR 737; *Consolidated Electronic Industries Ltd v Philips Electrical Industries New Zealand Ltd* (Auckland, A 1240.81, 19 February 1982).
15 *Harakas v Baltic Mercantile and Shipping Exchange Ltd* [1982] 1 WLR 958.
16 *Foodtown* case, *supra.*
17 In the former situation see *Harder v NZ Tramways IUW* [1977] 2 NZLR 162. An employer "directly affected" has status to apply to the Arbitration Court for a return to work order under s 119C.

Continued on p 128

LITIGATION

The following letter was received by the Editor. It is reproduced here, rather than the Correspondence column as it is a useful addition to the first feature under this headline.

Identification

DEAR SIR,

In the notes on "Litigation" by J V B McLinden [1983] NZLJ 35 the author stated in a footnote that provisions relating to identification parades, identification witnesses, and identification warnings enacted in the Crimes Amendment Act 1982 do not apply to purely summary hearings. With respect to the author, I cannot agree with that proposition except in so far as it relates to identification warnings. The identification warning is a warning that a Judge is required to give to the jury pursuant to s 344D of the Crimes Act and therefore it applies solely in respect of jury trials. The other provisions are more general and in my view apply both to summary hearings and to hearings on indictment.

The two sections of general application are s 344B and 344C of the Crimes Act. They are as follows:

344B **Attendance at Identification Parade Voluntary**

(1) No person charged with an offence shall be compelled to attend an identification parade.

(2) If any person charged with an offence does attend an identification parade, he shall be entitled to have his Solicitor present.

(3) Where a person charged with an offence has refused to attend an identification, no comment adverse to the person charged shall be made thereon.

344C **Information relating to identification witness to be supplied to Defendant:**

(1) In this section "Identification witness" in relation to the trial of a person accused of any offence, means a person who claims to have seen the offender in the circumstances of the offence.

(2) Subject to subsection (3) of this section, at anytime after a person has been charged with an offence, the prosecutor shall, on request by or on behalf of that person, supply to that person:

(a) the name and address of each identification witness known to the prosecutor, whether or not the prosecutor intends to call that witness to give evidence at the trial; and

(b) a statement of any description of the offender given by each such witness to the Police or to the prosecutor; and

(c) a copy of any identikit picture of a drawing made by any such witness or from information supplied by him.

(3) A Judge may, on the application of the prosecutor, make an order excusing the prosecutor from disclosing to the defendant any information referred to in subsection (2)(a) of this section if he is satisfied that such an order is necessary to protect the identification witness or any other person.

The reason that both the above sections are of general application and not just restricted to hearings on indictment are:

1 The right to have a solicitor present pursuant to s 344B or the right to request information pursuant to s 344C can be made at any time after the person has been charged with "an offence". It is therefore not related to the trial but may in fact occur prior to a plea having been taken or a right of election made (where appropriate). It would be a ludicrous situation if the right of a person to have a solicitor present at an identification parade was dependent on whether or not trial by jury had been elected, particularly when the identification parade is likely to occur prior to any election having been made.

2 The word "offence" is used instead of "crime" in both sections. Both "offence" and "crime" are defined in s 2 of the Crimes Act and have following definitions:

"Offence" means any act or omission for which any one can be punished under this Act or under any other enactment whether on conviction, on indictment, or summary conviction.

"Crime" means an offence for which the offender may be proceeded against by indictment.

If s 344B and 344C related only to proceedings by way of indictment then the word "crime" would have been used in each section instead of the word "offence". By using the wider term "offence" it is clear that Parliament did not mean the section to be restricted to those offences for which the offender may be proceeded against by indictment.

I have not overlooked the fact that ss 344B and 344C are not included in the sections referred to s 3 of the Summary Proceedings Act 1957. This is not of any significance because the Summary Proceedings Act relates to the Court procedure. Sections 344B and 344C do not relate to procedure but to matters arising after a person is "charged with an offence". It is also of significance that s 5 of the Crimes Act does not restrict the operation of the Crimes Act to offences laid under that Act but provides:

(1) This Act applies to all offences which the offender may be proceeded against and tried in New Zealand.
(2) This Act applies to all acts done or omitted in New Zealand.

Section 344C, in particular, will be of considerable use to the defence lawyer appearing in a summary hearing. Its usefulness will not just be restricted to defended police cases as it will also be very useful in traffic cases where identity can be very much on issue.

The main difficulties that I can see in respect of ss 344B and 344C are the steps that defence counsel will need to take if the prosecuting authority fails to comply with the obligations placed on it under those sections. Because there is no provision in the Crimes Act preventing the prosecuting authority from proceeding with the prosecution despite non compliance with either of those sections, I feel the most prudent course for defense counsel to take if the prosecuting authority is not co-operating is to file an Application for Review and seek to have the case adjourned until the Application for Review is heard.

Yours faithfully,

LA Andersen.

Specialist training of family law practitioners

IN 1981 the Extension Studies Department of the University of Canterbury offered a 27 session course for lawyers working with children and families. Entitled "Law and the Needs of the Child", the course aimed "to provide a conceptual basis of knowledge of human development and community resources on which a framework of practice skills might be built." The instruction was provided by several different people, mainly practitioners, from the relevant professional fields. These included psychology, psychiatry, social work, counselling and the law. About 30 Christchurch practitioners enrolled and their response, in general, tended to bear out the suggestion made on numerous occasions, particularly during the International Year of the Child, that lawyers working in this complex, sensitive and increasingly important area needed training in matters not traditionally covered in University family law courses. One leading practitioner taking part in the course noted in his work as counsel for children that the course appeared to be producing positive changes in attitude and understanding amongst some of the practitioners enrolled, even before the course had finished. Several practitioners regarded the instruction in communication and interviewing skills as particularly valuable.

The course was offered again in 1982 in a revised form under the title "The Law, the Child and the Family". The content of the course can be indicated by listing the topics covered and describing the kind of professional who led each session:

Section 1 — Family Relationships and Child Development

Families and the community (2 sessions)	Social worker
Infancy	Psychologist
Early childhood (1 session plus observation at a pre-school institution)	Lecturer in early childhood education
Middle childhood	Psychologist
Adolescence	School counsellor
Child abuse and neglect	Pediatrician
Understanding family problems	Child and family psychiatrist
Families in transition	Child and family psychiatrist

Section 2 — Communication and Interviewing Skills

Communication and interviewing skills (Friday-Satudary workshop plus 2 evening sessions)	Social worker/counsellor
Interviewing children (2 sessions plus observation of actual child and family interviews)	Child and family psychiatrist
Interviewing adolescents	Counsellor

Section 3 — Aspects of family law and practice

Helping professionals and agencies	Family Court counselling co-ordinator
Factors in abuse, neglect and custody access cases	Child and family psychiatrist
Social workers' reports	Social workers
Assessment, specialist reporting and expert evidence in custody and access cases	Psychiatrist
Aspects of practice in the Family Courts	Family Court Judge
Child representation	Solicitor

Again the enrolment was about 30 and the response generally favourable. It was clear however from the evaluation completed by participants at the end of the course that a course of this kind consisting mainly of evening sessions makes very heavy demands on the energies of busy practitioners. A Friday evening — Saturday workshop at the beginning of the Communication Skills section in 1982 reduced the total number of weeks required for the Course and was favourably received. Further reorganisation is planned when the course is run again, probably in 1984.

More detailed information about the course may be obtained by anyone planning a similar venture in another centre by contacting either of the following:

Margaret Waugh Department of Extension Studies University of Canterbury Christchurch 1

Iain Johnston Law Department University of Canterbury Christchurch 1

The Companies Amendment Act 1982

Here follows the second part of **Mark Russell's** commentary on the Companies Amendment Act 1982. Readers are referred to the January issue for the first part.

2 Trustee and Assignee Shareholders

The starting point as regards the position of trustees or executors who hold shares in a company is s 125 of the 1955 Act, which provides that "no notice of any trust, express implied or constructive, shall be entered upon the register or be receivable by the Registrar". The effect of s 125 of course is that neither a purchase of shares, nor the company, are taken to have notice of any trust affecting shares in the company. Neither need have regard to the way in which a trustee shareholder applies dividends and the proceeds of sale. However, a real difficulty arises by reason of the fact that at present the law treats an executor or trustee who is registered as a shareholder as liable in exactly the same way and to the same extent as all other shareholders. For example he will be liable to pay calls on unpaid shares although it is admittedly rare nowadays to have amounts remaining unpaid on shares. It must also be remembered that the trustee would have a right to indemnity against the estate in respect of any calls which he would have to pay. It was not always convenient to leave shares in the name of the deceased since many companies' articles provide that rights attaching to shares would be suspended if they were not transferred to the executor within a certain period. Another problem arose from the fact that a deceased estate was not able to take a rights issue or a bonus issue. The end result was that an executor or trustee was often reluctant to act as such if this meant that he had to be registered personally as a shareholder in a company without any limitation on his liability.

In their 1973 Report the McArthur Committee adverted to these difficulties and recommended that some change should be made to the liabilities of trustees or executors along the lines of those made by s 156 of the Australian Uniform Companies Act. (See McArthur, paras 208-215.) Pursuant to this recommendation there is enacted into the 1955 Act a new s 125A which is along the lines of the Australian provision. The section firstly provides that notwithstanding s 125 a trustee, executor or administrator of a deceased estate who is registered as a shareholder shall be entitled to be registered as the holder of that share as trustee, executor or administrator of the estate. Then the section expressly limits the liability of such persons to the value of any of the other assets of the estate. Finally, the section provides that such registration of a trustee, executor or administrator shall not constitute notice of a trust. Therefore, although the section has the advantage of limiting the liability of such persons as previously recommended by the McArthur Committee the position as regards notice of trust which existed under s 125 will continue and will not be affected by this new provision.

One point which may be noticed about the new s 125A is that the provision does not give a right to be registered regardless of what may be in the Memorandum or Articles of the Company. It is an enabling provision. The section leaves room for Articles to operate and give directors of the company a discretion to refuse registration as a member of a person who becomes entitled on the death of a member. (See *Charles Jeffries & Sons Pty Ltd* (1949) VLR).

Naturally when the trustee, executor or administrator is seeking to be registred in such capacity as a shareholder he will need to prove his status to the company. One matter which s 125A does not deal with is the question of what proof he needs to put forward in this respect. However common sense would dictate that the company will accept as sufficient evidence a Grant of Probate or Letters of Administration.

As regards the Assignees of bankrupt persons, s 7 of the 1982 Amendment inserts a new s 125B, which enacts similar provisions to those contained in s 125A. The rationale behind this provision being identical, it requires no separate comment.

3 Directors

Section 2(1) of the 1982 Amendment repeals the definition of "director" which appears in s 2 of the principal Act, and substitutes a new definition. A "director" is now to be defined as:

> (a) Any person occupying the position of director by whatever name called; and (b) A person in accordance with whose directions or instructions the persons occupying the position of directors of a company are accustomed to act.

Section 2(2) exempts from this widened definition of "director" any person who gives such directions or instructions while acting in a purely professional capacity.

This new definition of "director" is one that already appeared in the Act, for instance, in s 150(7), and s 131(4). However, those sections expressly limited the extended definition to apply only for their respective purposes. This limitation no longer applies, with the new, general definition of "director".

The widening of the definition accords with a recommendation made by the MacArthur Committee (para 300). It was felt that persons such as the directors of holding companies and also the beneficial owners of shares held by directors should in return for the obvious influence which they could wield over the conduct of a company, have an obligation to conform to the standards laid down in the Act for directors.

One would have to agree that the previous definition of "director" was artificial and arbitrary, in that it "missed the target" in the common cases where the "power behind the throne" was effectively in command. The attempt to remedy this is therefore to be welcomed to some extent. However, it is submitted that some problems are raised by the change.

Firstly, the Act has already become much stricter towards "directors" as previously defined. Most recently, the Companies Amendment Act 1980 had imposed some tighter obligations, for example, in s 320, which related to personal responsibility of, inter alia,

directors, for reckless or fraudulent trading. Also, it seems that the expected Securities Regulations will likewise impose new responsibilities and obligations. The question which arises is whether it is acceptable to extend all of these new obligations to the new class of director.

Secondly, there are many sections of the principal Act referring to directors where the wide definition is not applicable and could lead to confusion. For example, s 130, dealing with the Annual Return requires a list of directors to be supplied. This would surely not apply to the new class of directors. Again, s 180 et seq cover a wide range of matters dealing with directors. In the majority of cases these can have application only to formally appointed directors.

Perhaps it might have been preferable to have specifically limited the wider definition to those particular sections where it was desired to extend the liability of directors beyond those formally appointed to hold these positions.

Finally, s 12 and 13 of the 1982 Amendment respectively prohibit a body corporate from either holding the office of director, or company secretary.

The provision regarding directors results from a recommendation of the MacArthur Committee, which in turn was influenced by that of the Jenkins Committee. It was felt that, in the situations where a director could be held liable for some breach of a duty, either at common law or under statute, it was vital that such liability should attach to a natural person, rather than a corporate body. Otherwise, a personal liability, for example, to pay damages, could devolve eventually upon an innocent body of shareholders.

However, the need to fix an individual with liability is not so urgent in the case of company secretaries. It is quite common and convenient, within a group of companies, to have the holding company appointed as secretary of its subsidiaries.

An officer of the named company can then carry out the duties of secretary for one or more of its subsidiaries as circumstances warrant. Further, changes of personnel can take place within the holding company without the need for constant changing of the nominated secretary of the subsidiary. One wonders whether the change, in respect of secretaries, was really necessary.

4 Accounts

Section 8 of the 1982 Act amends s 130 of the principal Act, which relates to annual returns by companies with a share capital. Section 9 brings about similar amendments to s 131 which related to annual returns by companies not having a share capital. The new sections will come into force on 1 January 1984.

The previous s 130(1) and 131(1) provided that the annual return was to be made 30 days after either the annual general meeting or (if no meeting is held), the last day for holding such meeting, or if the company avoids the need to hold the meeting by doing everything required to be done by entry in its minute book, within 30 days after the last thing required to be done at that meeting was done by entry in the minute book.

The principal change is to require companies to file annual returns in the month determined by reference to the last numeral of a number allocated for the purpose by the Registrar. For instance, if the last numeral is 2 the return must be filed in February, if the number is 3, it must be filed in March, and so on. A company need not make a return under the new subsections in the calendar year of its incorporation, and a subsidiary may, with prior approval from the Registrar, make its return in the same month as its holding company.

Other amendments provide for certain additional particulars to be included in the annual return.

It appears that the intent of the new legislation is mainly to deal with administrative problems facing the Commercial Affairs Division of the Justice Department. It seems that the new provisions add nothing to the information which is to be available to the public. Instead, they may serve to create additional problems, for those responsible for the compilation and filing of annual returns. As far as accountants are concerned, they will fragment their work and involve more time spent, and therefore more cost to clients. Not surprisingly, much criticism has come from accounting circles.

In particular, the criticism arises from the fact that every public or non-exempt private company will require to make two effective filings of information during each calendar year, one being the annual return and the other, annual accounts and reports, required to be filed following the annual general meeting. It is common practice for public companies listed on the stock exchange to close their share registers prior to the annual meeting for the purpose of determining a list of shareholders eligible for a dividend. This same list of shareholders is the one which is filed with the annual return in compliance with the requirement of the Act. In the likely event that a company's annual return date is at variance with its annual meeting date, there will be the need to extract a second list of shareholders at a given time. This can create obvious difficulties and costs.

In the case of many private companies whose affairs are administered in the offices of chartered accountants in public practice, preparation and filing of an annual return is part of a service package dealt with in conjunction with preparation of annual accounts, filing of returns of income and the like. The accountant requires to obtain signatures on the annual returns as well as for other documents. The new proposals will require a considerable duplication of attendance on officers of the company and other administrative problems.

Apart from these major criticisms, there are other problems. For instance, if a company is required to file its annual return early in the year, then there may be difficulties in completing certain parts of it, for example the section dealing with the company's indebtedness.

All in all it seems that a great deal of reorganisation in accountancy offices will have to be done in order to comply with the new filing scheme. One wonders whether the advantages which may accrue to the Commercial Affairs Division are sufficient to warrant this.

5 Voidable Preference

Section 18 of the 1982 Amendment amends s 309 of the 1955 Act, by inserting a new subs (1A), which provides that in the case of a voluntary winding-up, every conveyance or transfer of property, every security or charge given over any property, every obligation incurred, every payment made (including any payment made in pursuant of a judgment or order of a Court), by any company unable to pay its debts as they become due from its own money, shall be voidable as against the liquidator, if (a) it is in favour of any creditor or any person in trust for any creditor; and (b) the making, suffering, paying, or incurring of the same occurs within one month of the

commencement of the winding-up of the company, provided that nothing in subs. (1A) shall apply to any such transaction or any such payment in respect of any liability incurred or accruing due, during or after the said period. The new subsection is in basically the same terms as s 56(2) of the Insolvency Act 1967.

The reasons for the enactment of s 309(1A) become apparent when one compares winding-up by the Court with voluntary winding-up. In the case of a winding-up by the Court the winding-up is deemed to commence at the time the winding-up petition is presented (not when an order is actually made); see s 224(2) of the Act. Now in the case of a Court winding-up s 222 further provides that in such a case dispositions of property, transfers of shares, alteration made in the status of members by a company after commencement of winding-up shall be void unless the Court orders otherwise either before or after the nearing of the petitions or the disposition, transfer, or alteration.

The point is of course that in the case of a Court ordered winding-up there is an interval between the presentation of the petition and the time when the order is actually made and yet the winding-up is deemed to date back to the time when the petition is originally presented. In the case of a voluntary winding-up, this is deemed to commence upon the passing of a requisite special resolution (see s 70 of the Act). There was no provision which allowed for the avoidance of transactions or acts by a company immediately before the commencement of a voluntary winding-up, unless an intention to prefer be established. The new subsection accordingly provides that in a voluntary winding-up certain transactions or acts in favour of a creditor by an insolvent company shall be voidable (without proof of an intention to prefer being required) if made or done within one month before the commencement of the winding-up. The need for an amendment to s 39 was highlighted by the decision in the recent case in *In Re Universal Management Ltd (in liquidation)* (M134/77 High Court, Wellington). In that case the liquidators of the company asked the Court to determine the validity of several securities given by the company and related companies. The securities in question were given 20 days before the passing of a resolution for the voluntary winding-up of the company. The liquidators contended that the version of s 309 which applied prior to the 1980 amendment governed the case. It will be remembered that the original version of s 309 imported the provisions of the Insolvency Act into the law of voidable preferences. Section 56(2) of the Insolvency Act contained the provision which is now paralleled by the new s 309(1A). Most notably, of course, s 56(2) did not require an intention to prefer. It is not surprising therefore, that the liquidators should submit that s 56(2) still governed the case. On the other hand, counsel for the company contended that the Companies Amendment Act 1980 applied to the case with the result that s 309 was not a self-contained provision which did not refer to or import the provision of the Insolvency Act 1967. If this was the case, of course the transaction could not be attacked unless a view to giving a preference to other creditors could be shown. Davison CJ held that the liquidators could complete the application under the old s 309 and s 59(2) of the Insolvency Act. However it was clear that since future cases could not rely on the provisions of the Insolvency Act, that some amendment to the Companies Act would have to be made to cover the case of voluntary winding-up. This is now achieved by s 309(1A).

The proviso to the new subsection is intended to protect from attack any fresh liability incurred during or after the one-month period by the company, for example, such items as wages, rent, or payment of current accounts.

Section 42 of the Matrimonial Property Act — a useful protection?

Introduction

Section 42 of the Matrimonial Property Act, 1976 provides a means for a non-owning spouse to protect an interest in land registered in the name of the other party to the marriage.

A notice of claim is lodged against the title to the land pursuant to s 42. The spouse's claim to the land is deemed a registrable interest for the purposes of the Land Transfer Act, 1952. Section 42(3) provides that such a notice is to have effect as if it were a caveat. Section 42(5) permits a notice to be registered notwithstanding that there is no dispute between the parties to the marriage and that no proceedings under the Matrimonial Property Act are pending or contemplated.

The purpose of this article is to examine the benefit this procedure affords the non-owning spouse. The notice of claim is of no value to the claimant unless the land is matrimonial property within the meaning of s 8 of the Matrimonial Property Act, 1976.

Cases

The facts of *Rusden v Rusden* (1980) 3 MPC 157 reveal that the wife had lodged a notice of claim against the title to a farm property owned by her husband. Their last matrimonial home had been on the farm. It was not economically feasible for either party to maintain the farm which was running at a loss. The wife then filed an application in the High Court for determination of the parties' interest in matrimonial property. Subsequently the husband contracted to sell the farm. He moved the Court for the removal of the notice, while his wife sought orders restraining the sale and granting her occupation. She contended that the sale would deprive her of the opportunity to obtain sole ownership of the farm.

The situation in *Moriarty v The Roman Catholic Bishop of Auckland*

(1982) 1 NZFLR 144 was similar in that the parties' respective interests in matrimonial property were undefined. At the time the husband agreed to sell his half share in land he owned jointly with third parties. The wife lodged a notice of claim of which her husband was not aware. The sale was settled. The purchaser sought removal of the notice in order to register the transfer. The proceeds of sale had been disbursed when the wife moved the Court pursuant to s 145 of the Land Transfer Act, 1952 that her notice of claim should not lapse pending determination of her interest in matrimonial property. In *Gregan v Gregan*, (1982) 1 NZFLR 385 Prichard J considered it significant that the parties' shares in matrimonial property had already been determined, when he was asked to order removal of a notice of claim lodged by the wife against the title to a farm property. Her husband had contracted to sell the farm. The land was adjacent to a property already controlled by Mrs Gregan. She wished to acquire her husband's farm in order that she and her son might farm both properties. She was prepared to buy her husband's equity in the farm.

The Judgments

In *Rusden* Thorp J discussed at length the character of a claim made under s 42, and concluded that although it cannot be deemed to have the same character or significance as a conventional caveat, the basic mechanics of the caveat system can be applied to it. However, as to the principles to be applied when considering an application for removal of either, he found that the differences between the notice of claim and the caveat were such that the same criteria was not appropriate. He held that on an application for removal of a notice of claim, the basic question for determination must be whether or not the continuance of registration is reasonably required to protect the rights of the claimant under the Matrimonial Property Act. The answer will depend on the facts of each case. The husband's application was made on the basis that the net proceeds of sale should not be disbursed until the determination of the substantive application. His Honour was satisfied that there was no realistic prospect that a Court would vest the property in the wife, and therefore granted the husband's application for removal of the notice.

Jeffries J in *Moriarty* did not concur with Thorp J on the principles to be applied in these cases. He held that since the legislature saw advantages in allowing a spouse to protect what is nothing more than a potential interest created by the Matrimonial Property Act, then that claim cannot be treated as being in any lower category than those legal or equitable interests which justify a conventional caveat. He said that the possibility of irreparable damage was the justification. His Honour was, presumably, influenced by the fact that settlement had been effected and the proceeds of the sale disbursed. To allow the purchaser's equitable interest in the husband's share of the land to be converted to a legal interest, could result in the wife's probable rights under the Matrimonial Property Act being defeated. He ordered that the notice should not lapse in respect of the half share to which the wife and the purchaser were competing claimants.

Prichard J in *Gregan* held that the judgment in *Moriarty* could not be read as suggesting that once it has been shown that the land is matrimonial property, the notice of claim cannot be removed except on final determination of proceedings under the Matrimonial Property Act. Once the claimant's rights have crystallised, the Court is able to consider whether or not to remove it. The claimant's rights have crystallised when the question of whether or not the land is matrimonial property is resolved, and when the Court is able to assess: the ratio of sharing, the degree of probability that the claimant will ultimately obtain sole ownership of the land, and the extent to which the claimant's interests can be protected. The Matrimonial Property Act accords no pre-emptive rights to a party wishing to acquire or retain any particular item of property in the absence of special considerations (such as the need to provide for a young family). He concurred with Thorp J that the Court should order removal of the notice when it is clearly shown that its continuance is not reasonably required to protect the claimant's rights to matrimonial property. It was ordered that the notice of claim be removed upon terms that the net proceeds of the sale be held in trust until further order of the Court.

Conclusions

The factor common to each of the above cases was that the Judge was concerned to see whether the claimant's interest could be safeguarded without preventing a disposition of the land. It would appear that where a sale of land to third parties is proposed, registration of a notice of claim will not assist the claimant to prevent a disposition unless
(i) there is some prospect that the claimant will ultimately obtain sole ownership of the land, or
(ii) there is no other means by which the claimant can gain control over the disbursement of the proceeds.
Where the claimant is concerned only to recover a share of the proceeds of the sale, the notice of claim has the effect of forcing the owner spouse to make provision for the safe custody of the claimant's prospective share, in order that the sale may proceed.

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Wellington District Officers 1983

The following Officers were elected at the Annual General Meeting of the Wellington District Law Society held on 23 March 1983:

President:
Mr B E Buckton

Vice-President: Mr R A Heron
Treasurer: Mr D P Neazor QC
Council: Messrs E H Abernethy
T W Blennerhassett
M R Camp
R M Elliott
J A L Gibson
J D Hanning
D E Hurley
R B King (Wairarapa)
J J McGrath
P E Martyn
Miss S M Moran

Overseas Correspondence

Bankruptcy Courts go bust

As I write this the Bankruptcy Courts in the United States are in a fine state of disarray. So much so that on 7 March 1983, the Honorable Barbara Crabb, a Federal Judge for the Western District of Wisconsin, located here in Madison, ordered the Honorable Robert D Martin, a Bankruptcy Judge also for the Western District of Wisconsin, to, "exercise jurisdiction and perform duties in conformance with the provisions of the Emergency Rule". In other words, "back to work Mr Martin, and pronto".

The problem arose from the 1978 Bankruptcy Act. While that Act clearly and constitutionally gave the Bankruptcy Court jurisdiction over the bankruptcy case proper, it went further and allowed Bankruptcy Judges to hear ancillary claims based on state as well as federal law. This, in effect, meant that the Bankruptcy Judges could hear cases which otherwise would be relegated under the United States Constitution to Article III Judges, (ie Federal District Judges). Federal Judges under Article III of the Constitution, such as the above-mentioned Barbara Crabb, are appointed for life and shall not have their salary, "diminished during their continuance in office". Bankruptcy Judges however are paid less ($63,600/year against $73,100/year) and are not protected under Article III for life tenure and diminution of salary.

In June 1982, the United States Supreme Court in a case now known as *Marathon*[1] ruled that the Bankruptcy Act of 1978 was unconstitutional in that it allowed Bankruptcy Judges to hear cases that constitutionally should be heard only by Article III Judges. The Court stayed its decision until 4 October 1982 to allow Congress to remedy the situation. When Congress did nothing, the Court extended its stay until 24 December 1982.

It is now March and Congress hasn't resolved the situation. The obvious solution is to make the Bankruptcy Courts Article III Courts thereby putting Bankruptcy Judges on a par with Federal District Judges. This was opposed by many because Federal Judges would be "lessened in stature", (several writers have hinted recently that Article III Judges may view Bankruptcy Judges condescendingly). Perhaps more cogently many felt it would be overly expensive, and democrats at least, were alarmed at the thought of President Reagan appointing 227 new Federal Judges. The credit industry, which feels that the 1978 Bankruptcy Act is too much to the debtor's benefit, is also trying to get substantive changes and have these changes included with any jurisdictional changes.

For these reasons the impasse remains, as does the confusion. The Federal District Courts, realising that after 24 December 1982, the Bankruptcy Courts would be in danger of collapse, adopted an Emergency Rule as an interim measure to allow the Bankruptcy Courts to function. These rules, in effect, told the Bankruptcy Judge which action he could hear himself and which actions should be referred to the Federal District Court (the Bankruptcy Act gave the Federal District Courts jurisdiction over bankruptcies until 1984, no one doubted that the Federal Courts could hear such cases).

While the Emergency Rules were clear enough, what wasn't clear to the attorneys was whether the Bankruptcy Judges would follow the rules. Counselling clients became almost impossible as attorneys were unsure whether the Bankruptcy Court would even allow the bankruptcy petitions to be filed. And, if the Bankruptcy Judges were going to refuse to act, then the automatic stay which enjoins any creditor action against the debtor, would be ineffective. As many bankruptcies are filed to get the automatic stay in effect, without it a bankruptcy action would be pointless and a waste of money. Calling the Bankruptcy Court was no help either as the Court clerks gave out contradictory information from one day to the next.

Attorneys who usually represent debtors became even more despondent when, on 9 February 1983, Bankruptcy Judge Robert D Martin stated that he was without jurisdiction to decide bankruptcy cases and thus declined to act in any bankruptcy case filed after 24 December 1982. Judge Martin's reasons for doing this were readily understandable. Firstly, it is not certain that the Federal District Courts have the authority to create or delegate authority to another Court as they have done under the Emergency Rule. Secondly, the question of indemnity and Judge Martin's personal liability arises if he exceeds his statutory authority.

Regardless of the justness of Judge Martin's actions, a civil action for declaratory and injunctive relief in the nature of mandamus was brought against him. The case was heard by the Honorable Barbara B Crabb, Federal District Judge, whose Court had entered the Emergency Rule on 24 December 1982. The result came as a surprise to no-one. Judge Crabb ruled that her Court's Emergency Rule was valid and that Judge Martin was bound to follow that Rule.

The matter almost certainly will not rest there. Judge Martin may appeal Judge Crabb's decision, or he may, simply, ignore it. it is also possible that Congress may pass some compromise legislation although their stultifying inactivity so far would indicate otherwise. In the interim there is little solace for the debtor and his attorney. The Bankruptcy Courts may be back in business again, but then they may not be. Attorneys find it hard enough to explain the Bankruptcy Act provisions to their clients without having to explain why the Bankruptcy Courts may have closed for the day.

1 *Northern Pipeline Construction Co v Marathon Pipeline Co*, 102 S Ct 2858.

Gray Williams

Communicating

Communications skills in the legal profession

J M Von Dadelsen

"Seen it all before" many may sigh. That may be so and you may have tried to communicate more effectively. But how long did it take before you once more slipped into the jargon and again projected that "rushed off your feet" attitude. We all do it to some degree hence the need to try, through the pages of this *Journal* to redress some of the problems that lack of communication can cause.

This is the first of a number of articles aimed at the lawyer both in his working life and his social life. It is hoped that by pointing to the problem areas we may all become more aware, and by an ongoing process educate ourselves to better expression.

"Shake hands with your patients," doctors are advised by the British Medical Journal. *"It provides immediate physical contact, sadly often missing when doctors meet patients," Dr Keith Ball of the Central Middlesex Hospital Department of Community Medicine writes. "It helps to put both parties at ease and on the same level," he said, adding that he doubted whether all doctors would like to think themselves as on the same level. (NZPTA Report, January 1983).*

I Introduction

THE advice given to British doctors in the *British Medical Journal* might equally well have been given to New Zealand doctors and lawyers. Critics of the New Zealand legal profession might well characterise the typical New Zealand lawyer as being an upper middle-class pakeha male. Whether one accepts that stereotype or not, it is an unfortunate fact that clients frequently find their legal advisers unapproachable and hard to communicate with.

The more harsh critic of the profession would suggest that these difficulties result from the arrogance and self-importance of the lawyer, but the truth is more complex. Because lawyers have been exposed to a high level of education they are familar with and constantly use more complex words than the population generally. As a result there are many with whom the practising lawyer converses or corresponds who may not understand the words the lawyer uses. Because of a sense of inferiority or shyness many people who are exposed to words they do not understand will not admit their lack of understanding. If the lawyer is unaware of any communications difficulty then the problem is compounded.

If the communications problems between lawyers and their clients could be overcome then the image of the profession might be considerably improved.

The present concern about "simpler drafting" is an expression of the concern of the community and profession alike that lawyers should use words which are more capable of understanding by more people.

To improve our ability to communicate we need to understand the communication process and improve upon our communication skills. This article is intended as the first of a series examining communication skills with particular reference to the legal profession.

II Lawyers as communicators

1 Advocacy

It is in the forensic context that the lawyer is most commonly seen as a communicator. The advocate's art is practised at every level from the Privy Council down to tribunals such as a licensing authority or local body hearings committee. The nature of the advocate's "performance" will vary according to the tribunal in which the advocate is appearing. The second of this series of articles will consider the different approach required in differing speaking contexts.

2 Client interviews

Every interview (whether with a client, a witness or someone with whom a client is dealing) involves the exercise of communication skills. In that situation the lawyer needs to be sensitive to the level of education and understanding of the person being interviewed and to the reason for the interview. The domestic client will require a different approach from clients involved in a criminal prosecution or estate administration or purchase and sale of a house.

The interview may be one-to-one or may be a more complex set of relationships extending to a conference involving several lawyers, clients and other advisers such as accountants.

The approach to the interview or meeting will differ according to the difference in the purpose, and may involve one or more of the characteristics of counselling, mediation, interrogation and advocacy.

For the client, the approach of the lawyer at the first interview (in particular) can be very important. The difference between a negative "What's the problem?" and a positive "What can I do to help you?" is dramatic. The negative approach frequently confirms to the client that he or she has problems of considerable magnitude, while the positive approach places the client at ease and offers him or her the hope of real assistance.

3 Correspondence

With the use of dictation equipment the style of correspondence may vary from the stream of consciousness letter to the more carefully considered and precisely worded piece of prose. The use of word processors and memory typewriters, of course, should assist in producing better letters. Just as with verbal communication the author of a letter must bear in mind the nature and state of mind of the recipient. An insensitive and unyielding letter may serve to aggravate a dispute which should have been capable of resolution without undue heat being generated. In cases where firmness is required it is still possible to be reasonable and to reduce the potential for unnecessary tension.

4 Documents

The present concern for "simpler drafting" provides the best evidence of

the demand within the community (and more recently the profession) for greater clarity and simplicity in legal documents. Because a document is generally considered to be a static record rather than as part of an ongoing process of communication, we tend to overlook the fact that the document is intended to communicate to its readers the intention of the authors of the document. Where a document is being negotiated (such as in offers and counter-offers for sale and purchase) the document is indeed a communication until final acceptance.

5 Community speeches

Because of community interest in the law lawyers are commonly asked to address community organisations on subjects relating to the law and its implications for the community. Furthermore, because of the involvement of lawyers in community activities they are frequently called upon to speak to community organisations on non-legal subjects. I would suggest that it would be a rare lawyer who would go through his professional life without being asked to speak to a community organisation.

III Nature of the communications process

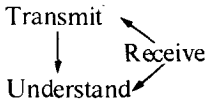
1 Human communications

What sets mankind apart from the rest of the animal kingdom is its ability to communicate intelligently. To the extent that we fail to communicate properly we are less human and less successful in living out our destiny. Poor communicative ability is the root cause of many social (and consequently legal) problems such as marital stress, family tensions, commercial disputes, union-management tensions, racial tensions, and international incidents.

If we really heard what was actually said by others, if we could think things out logically, if we could actually say what we meant to say many problems could be avoided and resolved.

2 Communications cycle

It is a cliche to suggest that communications is a two-way process involving the transmission of the message and its receipt. In fact communication involves three phases which may be portrayed as:



This communications cycle is translated into the motto of *Toastmasters International* as:

Better Speaking
Better Listening
Better Thinking

The communications cycle is only complete, then, when the message is not only received but understood and the hearer provides some feedback.

3 Communciations symbols

The most readily identifiable communications symbols are words, whether spoken or written. It is in verbal communications that additional skills come into play with the use of facial expressions, gestures, body language, visual aids and vocal variations in tone, volume and pace.

A speaker's personality and sincerity are reflected in the way the speaker talks. We may form an impression of another person only by hearing him through a telephone or on radio, liking or disliking the person without even seeing him. Our impressions will be more accurate if a visual medium such as television is used, and will be even more accurate and lasting if we actually meet and converse with the speaker, in which case not only the speaker's communication skills come into play but our own.

4 Importance of good communications

Our communicative abilities — or lack of them — influence others to like or dislike us, love or hate us, hire or fire us, believe us or disbelieve us. When we are exercising the art of communication on behalf of other people (who pay us as well) we have a greater responsibility to communicate as effectively as possible. Perfect communication is seldom achieved, but we still have a responsibility to improve as much as possible. Effective speakers such as John A Lee or Winston Churchill are made, not born. Access to information on communications skills and learning by doing will lead to improvement.

IV Availability of communications training

1 Training for lawyers

The public seem to expect lawyers to be trained in public speaking skills and in counselling, and probably have a right to that expectation. There are of course many very effective communicators amongst the profession but unfortunately our skills as communicators are frequently learned by trial and error.

No formal communications training is provided in New Zealand University Law Schools or through any Law Society programmes. Certainly students are given opportunities to learn to express themselves, but the techniques of good communication are not taught as such. Encouraging students to be actively involved in tutorials, mooting, mock trials, and neighbourhood/community law centres is obviously helpful, but if communications techniques are learned it is more likely to be absorbed by osmosis than acquired directly. Some of the universities are now offering courses in mediation and counselling skills, particularly as a result of developments in the Family Courts and this should be applauded.

Formal programmes for the training of the legal profession in communications skills (whether at the student or graduate levels) may not be capable of achieving worthwhile results unless conducted in the context of relatively small groups. However, a higher level of consciousness of the communications barriers which exist between lawyer and client, and lawyer and the general public should lead to the removal of those barriers over a period of time. Perhaps it would not be unduly cynical to suggest that as economic circumstances force the profession to be more conscious of its public image and public relations more and more members of the profession will become aware of the need to improve their own communications skills as a personal priority.

2 Professional coaching

The New Zealand Speech Communication Association (NZ) Inc (previously the New Zealand Association of Speech and Drama Teachers) has members throughout the country who are trained to educate students in the art of communication.

There are other businesses offering courses in communications skills, with a variety of expertise and expense.

3 Voluntary organisations

There are a number of voluntary organisations, most of them international, which offer opportunities to develop communications skills. *Jaycees* offer some training, primarily through practical experience, while other organisations such as *Toastmasters International, Toastmistress International* and *Tecorians* provide educational and practical opportunities for developing communications skills. In addition there are debating and public speaking organisations in many parts of the country.

V Future articles

Future articles will include subjects such as speech preparation, use of language, use of visual aids, and effective listening. Some articles will have direct relevance both to legal practice and general communications skills, while other articles will have less direct relevance to legal practice. The author would welcome any questions, contributions and criticism.

The best little storehouse in Taxes

A funny story?

I am often asked. . . well, I am sometimes asked . . ., well, to be frank, some accountant asked me once, "what do you reckon is the best provision of the Income Tax Act?" What a question! Impossible to answer.

And yet any (tax) lawyer, or accountant for that matter, must really address himself or herself to a question of this sort when the client is entering into a new situation, be it a commercial or financial or property transaction or whatever. It is really just another way of saying what are the best parts of the Taxing Acts under which the transaction should be brought. Indeed can the transaction be structured in such a way that it falls completely outside the reach of the revenue claws?

Look out!

Tax law is becoming far more complicated — almost daily it seems. Just look at the recent horrendous and complex provisions of the 1982 No 2 Amendment Act. If this carries on, we will soon be in the United Kingdom league of turgid tax text.

So now more than ever before we must think "TAX" every time a client puts a deal on our desk for consideration. Sometimes that should be the first thought. If not, we may be reaching for our professional indemnity policy sooner than we would want. Do not forget the unfortunate firm in *Morgan v Beck and Pope* (1974), 1 NZTC 61225. It cost them well over $13,000. In those days — the events of the case happened in 1969 — perhaps most of us did not think of gains from sales of land as being taxable. But they were even then in some circumstances, as the parties in that case discovered.

It was Lord Diplock who said as recently as 1978 (in *Saif Ali v Sydney Mitchell & Co* [1978] 3 All ER 1033 (HL) a case dealing with immunity of barristers against suits for negligence):

> Those who hold themselves out as qualified to practise other professions, although they are not liable for damage caused by what in the event turns out to have been an error of judgment on some matter on which the opinions of reasonably informed and competent members of the profession might have differed, are nevertheless liable for damage caused by their advice, acts or omissions in the course of their professional work which no member of the profession who was reasonably well-informed and competent would have given or done or omitted to do. (p 1041)

That, then is the yardstick. How do we measure up? Most transactions probably have a tax element somewhere in the woodwork. If we are reasonably well informed and competent, then we should be astute enought to detect where and when that tax animal is likely to raise its ugly head. Should we overlook this or merely put it on one side (hoping the accountant may look into it?), then we do so at our peril. What did you say was the franchise on your policy?

So much for warnings. Back to the main theme.

Local storehouses

In this context I read "storehouse" as meaning "revenue saver". So what provsions are there in our taxing statutes under which a taxpayer pays rather less tax than he otherwise would?

So much has been written about the well known areas, labelled under the general head of "Tax Avoidance" in the last Budget, that I will eschew them. But there are others. For instance s 63. The important words are:

> "Dividends derived by any New Zealand Company from companies . . . shall be exempt from income tax".

The two famous *Europa* tax cases in the 1970s, which found their way to the Privy Council, revealed that the New Zealand company received handsome dividends from the Bahamanian company without suffering tax on them. The *Wix Corporation* case of more recent vintage is another example. What was done there would not have been contemplated by the parties if the receiver of the dividend had been an individual and not a company. As a taxsaver, it was a beauty.

The next beauty is to be found in a centrefold but not in Playboy. How's this as another fine example?

SPECIFIED TRUSTS

> "Where the estimated Trustees' Income for 1983 does not exceed $19,987 use a flat rate of 35c in the $1."

That quotation is, believe it or not, to be found in the centrefold of the 1982 Estate and Trust Tax return form. Put laconically like that it does not appear as the gem it really is. Rather like a precious stone lying uncut and in its natural state. How can good use be made of it?

Suppose that you have a family trust which is discretionary both as to capital and income; the usual run I would think for some years now. If some or all of the beneficiaries are paying tax in excess of 35 percent, then that is the time to take advantage of this provision. In the 1982/83 tax year from

$12,601 onwards, an individual taxpayer pays tax of more than 35 percent. The method is simple like all the best ones. Income can be allocated or paid to the beneficiaries to bring them up to $12,600 and then the trustees must capitalise the balance and pay tax at 35 percent on that balance up to the $19,987 figure mentioned above. The trustees can then distribute the remaining 65 percent in the following tax year as capital in exercise of their discretion. This payment is, of course, tax free in the hands of the beneficiaries. In the right case such moves are obviously worth while. The tax saved can build up into a substantial storehouse!

These two examples show how profitable it can be to be reasonably well informed. If you find that you have no chance of being well informed in yet another area of the law, then your remedy is simple. Take advice — either from a competent tax accountant or tax lawyer. Even the regular accountant of your client would be happy to have some back-up — someone else to look to in a case too difficult for him. To borrow an aphorism from another context but nevertheless true in this one: "It's got to be good for you".

International storehouses

This section is not a short tour of the red light districts of London, Amsterdam and Bangkok. Rather it is a brief look at tax havens. Usually they are to be found in tropical paradise islands somewhere like the Bahamas where Europa (see above) went. But also there are Bermuda, the Cayman Islands and the Virgin Islands, the latter being formerly known before the advent of the permissive society in Britain as the British Virgin Islands. Apparently after that there were no longer any British virgins. But nearer home we have Nauru, Vanuatu and more recently the Cook Islands. In 1981 and 1982 the Cooks enacted special legislation like the Offshore Banking Act, the International Companies Act, the Offshore Insurance Act, etc, to attract this lucrative offshore business. The Cook Islands Trust Corporation Ltd was formed to nurture and develop it.

How are tax havens storehouses? In esence they are no or low tax areas in which a large slice of profit in world-wide commercial transactions can be trapped. Thence the funds can be used for further development of the multinational business, or just spent by the beneficiary; credit cards are great for this.

This sounds all very well, but how do you pick the tax haven suitable for any particular transaction? it has to be accessible, enjoy excellent communications and banking facilities, have quality legal and accounting services domiciled there and perhaps above all be politically stable. No wonder there are some having sleepless nights in Hong Kong and in Cyprus.

International tax planning conferences must be the most popular in the world. They happen with great regularity especially in USA and Europe, although there is many an excursion to the Caribbean for "a view" as it were.

Rarely do you find "How to do it" sessions at such conferences unlike our domestic estate and tax planning conferences. The international ones are really meeting places. True there are lectures, workshops and discussions but there only appear at these glimpses of the tricks of the trade. Conferences are not to inform the uninitiated but to allow them to meet others who are in the know and who, *for a fee,* will give you advice to help your client.

One helpful introductory text for the newcomer is "Practical International Tax Planning" by Marshall Langer now in its second edition, as well as publications by Tax Management International such as "Principles of Tax Planning", which runs to just over 100 pages.

To give you an illustration of how to do it, have a look at John Prebble's article in the Victoria University of Wellington Law Review of February 1982 and you will see how stepping stones around the world can be used. Tax Treaties have an important part to play in the steps.

Planning on the international scale must be considered in any commercial transaction with overseas connections. Domestic tax planning is often best if it is simple. International planning is never simple nor is it cheap. Therefore in any international transaction you always have to weigh any theoretical watertight tax plan in the scale of "is it worth it?" There are huge savings to be made but not in every case. With your assistance and guidance your client has to make the judgement and in the final analysis answer that question. Storehouses there are across the world. You have to choose carefully, if at all, to see which are the best in any particular case.

Tony Ferrers

Who is my Client?

The following is an article which first appeared in the English Law Society's Guardian Gazette Volume 80, Number 4. It is reproduced here with the kind permission of that publication's editor.

Husband and Wife as Clients

By Alec Samuels* BA

Husband and wife consult a solicitor, or at least husband and wife go along to see a solicitor. The husband fixed the appointment and he attended together with his wife but he did all the talking. Who is the client? The husband, obviously. But what of the wife, is she a client too, or merely someone who happened to come along with him? Or the situation may be that she did the arranging and the talking, and he just came along.

What does it matter?
Who can instruct the solicitor, one or both, or one acting on behalf of the other?
In whose name should the documents be made out?
To whom is the duty of care owed?
Suppose there is, or may be, a conflict of interest?
Who is liable for the bill?

Relevant matters

The answer will probably in many cases be a matter of fact on the evidence. The prudent solicitor will probably clarify the position, at the earliest

possible stage, both orally and in writing, so as to avoid any misunderstanding or mistake. Relevant matters might include:

Who fixed the appointment?
Who attended the interview or interviews?
Who did the talking?
Who wrote and signed and sent the letters?
Whose name was put on the documents eg legal aid forms, deeds.
In whose name did the solicitor purport to act in correspondence with the "other side".
What was the nature of the subject matter on which advice and assistance was sought and given?
Were both affected, or only one, eg a personal injury suffered by one of them?
To whom were the bills rendered?
Who paid such bills as were paid?

If H arranges everything, does all the talking, conducts all the business affairs, pays the bills, and is in complete control then it may well be that he is the sole client, though he may be acting as agent for both of them. If both of them do things together, both playing an equal or complementary role, then the chances are that both of them are clients.

If the husband purports to act for them both, eg in a joint house sale or purchase, the solicitor may assume that the husband has authority, although as a matter of prudence it should be confirmed as it may turn out to be false. The wife who refuses to go along with the sale of the matrimonial home by the husband, or who changes her mind, can cause acute embarrassment, and financial loss (*Wroth v Tyler* [1974] Ch 30).

The "sensible" wife?

Even if both of them are clients, it has been held that the solicitor cannot act on the sole instructions of the wife, because the solicitor should not have taken instructions from her when the husband was available, "for a sensible wife did not generally make major decisions" (*Morris v Duke-Cohan* (1975) 119 SJ 826, Caulfield J). This proposition seems redolent of social attitudes and practices now gone. If the wife is in fact a client then surely she can give instructions just the same as any other client. If she is purporting to act as a client on behalf of both clients, herself and her husband, in a matter affecting both of them, then presumably the solicitor is entitled to satisfy himslef that she has in fact obtained the consent of the husband, as she cannot act on his behalf without express, implied, or ostensible authority.

Agent of Husband

A married woman may retain a solicitor on her own behalf (Law Reform (Husband and Wife) Act 1962, s 2). But she cannot act as agent for her husband on an agency of necessity — that was abolished by the Matrimonial Proceedings and Property Act 1970, s 41 (repealed by the Matrimonial Causes Act 1973 and not replaced, but the repeal by the 1970 Act is believed to stand, the pre-1970 position not being revived).

If W is a client, and her name is entered on the title deeds, then she is protected. Even if she were not a client, but her name was on the title deeds, she would be protected unless and until there were rectification. If she was not entered on the title deeds, she is not a legal owner and then her position is weaker, although as a non-legal owner in possession having an equitable interest she can register a Class F land charge to prevent a third party gaining priority over her, and as a non-legal owner in actual occupation she has an overriding interest which will protect her in most cases (*Williams & Glyn's Bank v Boland* [1981] AC 487).

W not a Client

Even if W in fact is not a client, the solicitor may well be liable to her, if she is a person within his direct contemplation as someone who is likely to be so closely and directly affected by his acts or omissions that he can reasonably foresee that she is likely to be injured by those acts and omissions (*Ross v Caunters* [1980] Ch 297, 322-323, Megarry V-C; *Hedley Byrne v Heller* [1964] AC 465; *JEB Fasteners v Marks Bloom* [1981] 3 All ER 289). Any transaction by the husband, especially in any sort of family matter, eg property, or will, will almost certainly affect the wife, and the solicitor must surely be aware of this. The solicitor would have to warn the husband, and refuse to act if the husband were purporting to deal with the property of the wife, or adversely affecting the wife, improperly.

Conflict of interest

If there is any conflict of interest, or real likelihood of conflict of interest, then the solicitor must immediately raise the matter with the husband and wife, and refuse to act for both of them. It seems to be professionally acceptable to act or to continue to act for one, and to advise the other to seek independent legal advice and assistance, though the purist view is that in such circumstances the best thing is really to refuse to act for either. In practice it often causes great resentment in the rejected one that the solicitor formerly acted for him or her, perhaps over a number of years, and then, when a dispute arose, continued to act for the other, against him or her, and knowing something of the affairs of the rejected one.

H and W were in matrimonial dispute. They lived in H's mother's house. The mother purported to determine the licence of W to remain in the house. It was held that in view of the conflict of interest between mother and son the solicitor should not have acted for them both, and should have refused to accept instructions from either of them (*Dawes v Dawes* [1982] *The Times*, 25 February, CA).

In these days of very common matrimonal breakdown, any matrimonial matter, eg concerning the matrimonial home, can lead to a conflict of interest. The occasion for registering a Class F land charge to protect W can arise at any time. Presumably on many occasions even today the solicitor may properly assume matrimonial harmony, eg newly-weds acquiring their first home or established middle-aged parents changing the family house. But if in fact both parties are the clients then they should both be told what the legal situation may be in the event of breakdown. The advice to be given to one spouse is not necessarily the advice to be given to the other. Take the position where husband and wife are both clients; they both provide part of the deposit or purchase price and by agreement, the house is nonetheless conveyed into his sole name. The legal consequences of this should be explained in both, and particularly to the wife, who may be potentially at some risk in that situation. After all, a Class F registration is not as good as joint legal ownership.

Man and Cohabitee

In ascertaining whether the woman accompanying the man is also a client, whether she is a wife or cohabitee would seem to be irrelevant. She may be an agressive, participating, equal

partner, very much a client; or she may be passive and dependent, and such less likely to be a client. However, the possibility of breakdown must be high in the case of man and cohabitee, and in view of her lack of status her need for independent advice and assistance, eg in drafting cohabitation contracts and joint property acquisition, is correspondingly greater. Though a cohabitee may be aware of the situation, aware of the risk and of the desirability of separate advice, the wife may be altogether more "trusting" and less aware.

Extent of the Duty of Care

The extent of the duty towards a client depends upon a number of factors, such as the nature of the subject matter, the advice sought, the instructions given (*Carradine v Freeman* [1982] *The Times*, 19 February, CA).

Insured

The solicitor is insured in respect of negligence claims, but the fact of a claim being made, and especially the fact of an ultimately successful claim being made, can be very embarrassing for the solicitor in terms of publicity and confidence and reputation.

Biblography

Cordery on Solicitors (7th ed) 1981.
"Duty of Care on the Part of the Solicitor", Alec Samuels [1982] *Gazette*, 14 July, 913.
Halsbury's Laws of England (3rd ed) Vol 36, Pt 3, p 59, Retainer.

The author is grateful to Dr P Pearce for comments, without responsibility.
**Barrister, Reader in Law, University of Southampton.*

The Securities Act 1978 — Reform of the law about public offers of securities

1 Introduction

This is a status report for the information of interested parties and their professional advisers on progress with the reform of the law about public offers of securities.

The Securities Amendment Act 1982 was enacted on 16 December 1982. When it is brought into force, it will complete the statutory basis for the reform that was initiated by the Securities Act 1978 ("the Act"). Further details will be enacted as regulations by Order in Council under s 70 of the Act. In addition, the Securities Commission will be making use of its power to exempt certain persons and classes of persons from compliance with provisions of the Act and regulations upon such terms and conditions as the Commission thinks fit.

2 Bringing the statutes into force

The provisions of the Act as amended that are in force at the present time are ss 1, 2, 5(5), Part I, and ss 48(3), 48(4), 70, 72 and 76 (Securities Act Commencement Order 1979 (SR 1979/94) and s 2(2) Securities Amendment Act 1982). The other provisions will be brought into force by Orders in Council, which will be co-ordinated with the enactment of regulations under s 70.

3 Securities Regulations — offers, advertisements and prospectuses

The Act provides a novel procedure for the making of regulations. Under s 70, regulations may be made by Order in Council in accordance with the recommendations of the Securities Commission. The regulations will apply to debt securities, equity securities and participatory securities offered to the public by individuals, companies and organisations of every description. The Commission is required to do everything reasonably possible on its part to advise all interested persons and organisations of the terms of the proposed regulations, and to give them a reasonable opportunity to make submissions. Notice of the Commission's intention to make a recommendation is required to be published in the *Gazette*, and copies of the proposed recommendation are required to be available for inspection by any person on request.

Under these provisions, the Commission published the first draft of its proposals for Securities Regulations on 31 March 1980, distributed 700 copies of the draft, and invited interested parties to express their views about it. The Commission received 71 written submissions. Most of them came from organisations of interested parties, such as the Listed Companies Association, the New Zealand Law Society, and the New Zealand Society of Accountants. The Commission has carried out extensive consultation and discussion with interested parties about the policies and successive texts of the draft.

Some important suggestions were found to fall outside the scope of the 1978 Act. The Commission consulted the Minister of Justice about them. He agreed that the Commission should examine those suggestions and, if the Commission thought fit, recommend enabling legislation. On this basis, the Commission prepared a second draft of the regulations, which was published in October 1981. After further consultation, the Commission amended the second draft in various respects, informed the parties who had made submissions of the text of the amendments, and reported to the Minister of Justice with proposals for enabling legislation. The Government accepted those proposals, with the consequence that the Securities Amendment Act 1982 was enacted.

On 17 February 1983 the Commission, having reconsidered its proposals for regulations, published a notice in the *Gazette* pursuant to s 70(3) of the Act, of its intention to recommend the enactment of regulations. The proposed regulations follow the second draft amended as notified to interested parties and further amendment in minor respects to accord

with the terms of the amendment Act. They set out rules relating to full-form prospectuses, short-form prospectuses and the information that will be required in them, advertising offers of securities and the contents of trust deeds and deeds of participation. They refer to securities of all kinds, and with few exceptions will apply to entities of all kinds. The proposed recommendation can be inspected at the offices of the Commission.

4 Transitional provisions

The Commission intends to transmit its formal recommendations to the Government early in March. These will include a recommendation that the new regulations come into force not earlier than 8 weeks after they are made by Order in Council. This lead time should enable all those who will be affected by the regulations to take steps to comply with them, or to apply to the Commission for exemption. The draft regulations contain special provisions regarding offers of securities under the Companies Act 1955, the Protection of Depositors Act 1968, and the Syndicates Act 1973, that are "in the pipeline" when the regulations come into force.

5 Exemptions

Although the Act and draft regulations are expressed in terms of the widest application, s 5(5) of the Act authorises the Commission to issue to any person or class of persons revocable exemptions from compliance with any of the provisions of Part II of the Act or of the regulations on such terms and conditions as it thinks fit.

The Commission has so far decided to exercise this power in respect of 4 classes of persons:

(1) Trust boards incorporated under the provisions of Part II of the Charitable Trusts Act 1957, which borrow money from the public, will be exempted from compliance with the prospectus provisions in relation to offers and allotments of debt securities.

(2) Issuers of debt securities (other than natural persons) that are organised and subsisting, or are carrying on business, exclusively for charitable, educational, religious or recreational purposes or as a chamber of commerce or trade or professional union or association, will be exempted from compliance with the prospectus provisions and some of the advertising provisions in respect of issues of debt securities where the sum raised in any 12-month period is less than $200,000 and the amounts owing under outstanding debt securities do not in aggregate exceed $1 million.

(3) An exemption will be available to dealers in commercial bills of exchange in respect of bills on which a dealer is liable. The effect of the exemption will be to exempt other parties to the bill from compliance with the prospectus requirements of the Act where the bill is offered by the dealer to the public. The dealer will be required to have a current prospectus relating to his affairs available to all persons on request.

(4) Issuers of debt securities to persons who already hold debt securities of the same class will be exempted from the requirement that allotments can only be made on receipt of a form of application distributed or contained in a registered prospectus where a current prospectus has already been provided to the investor.

6 Applications for exemption

It will not be necessary to apply for the exemptions mentioned in paras 5(1), 5(2) and 5(4). These will be issued as class exemptions relating to all members of the respective classes defined in the notices of exemption. Copies of the draft notices are available from the Commission. (It is proposed to publish the drafts in a forthcoming issue of the *Journal*). Applications are required for the exemption mentioned in para 5(3) — bills of exchange — and are being received by the Commission.

The Commission has applications for three other class exemptions under consideration, viz:

(a) Entities established overseas who make offers of securities pro rata to all their members, including members in New Zealand, in accordance with overseas, instead of New Zealand, law;

(b) Trustee corporations wish to be exempted from the need to appoint a separate trustee for their Group Investment Funds;

(c) Organisations of the kind mentioned in paragraph 5(2) which have rules entitling members to interests in, or rights to use, assets (which include many sports clubs, for example) wish to be exempted from the obligations to issue a prospectus when appealing for members. In many of these cases, mere membership would otherwise be caught by the definition of the term "participatory security"

Decisions on these applications will be made before the regulations come into force.

The Commission is not aware of a need for any other class exemptions. Applicants who wish to ask for particular consideration should write to the Executive Director, Securities Commission, PO Box 1179, Wellington, giving the following information:

(a) The name of the applicant with his postal address and telephone number.

(b) If the application is made on behalf of a group of issuers, particulars, including names, of the members of the group.

(c) A brief description of the activities of the applicant and of the securities which it issues or intends to issue. Current financial statements and samples of relevant documents are usually required.

(d) A list of the specific provisions of the Act and the draft regulations from which the applicant seeks to be exempted and a brief statement as to the reasons why the applicant considers an exemption should be granted from these provisions.

7 Contributory mortgages

The recommendations mentioned in para 3 will not include the Commission's proposals on contributory mortgages. The first draft of these was published in December

1981, submissions have been received from interested parties and the Commission's second draft was sent to them in September 1982. Consultations are continuing. When these have been completed, a separate recommendation for regulations will be made.

8 Code of advertising practice

The Commission has decided that many points of detail which might be included in regulations about financial advertising will be appropriately dealt with in the Code of Advertising Practice. This is a voluntary code administered by the Committee of Advertising Practice. The Committee has been in existence for many years as part of the self-regulatory mechanism within the media and advertising industries. The Committee, in consultation with the Commission, is completing a revision of the section of the code that deals with financial advertising. Advisers to issuers will need to be familiar with the Code as well as with the Act and Regulations.

Recent Admissions

Matheson, I D	Wellington	25 February 1983
Mazzoleni, A J	Auckland	4 March 1983
Mexted, J L	Wellington	25 February 1983
Moleta, M	Auckland	4 March 1983
Murray, S G L	Auckland	4 March 1983
Murrihy, J J L	Wellington	25 February 1983
Muston, J F	Auckland	4 March 1983
Napier, H J	Auckland	4 March 1983
Narayan, R	Wellington	17 December 1982
Nicholson, L M	Auckland	4 March 1983
Norris, B A	Auckland	4 March 1983
Norris, D E	Auckland	4 March 1983
Oxnevad, E A	Christchurch	21 December 1982
Parker, D J	Auckland	4 March 1983
Peters, L D	Wellington	25 February 1983
Peteru, V R	Auckland	4 March 1983
Phillips, S A B	Auckland	4 March 1983
Pointon, P D	Wellington	25 February 1983
Pollak, G M	Auckland	4 March 1983
Posthouwer, M A	Auckland	4 March 1983
Powrie, F C	Auckland	4 March 1983
Rae, J McF	Auckland	4 March 1983
Rankin, B P	Auckland	4 March 1983
Reesby, J C H	Wellington	25 February 1983
Reid, B H	Wellington	25 February 1983
Rice, C S	Auckland	4 March 1983
Richardson, M L	Wellington	25 February 1983
Roberts, A P	Wellington	25 February 1983
Rogers, C A Q	Auckland	4 March 1983
Rutherford, K J	Auckland	4 March 1983
Saunders, L M	Auckland	4 March 1983
Schneideman, B A	Auckland	4 March 1983
Scholtens, M T	Wellington	25 February 1983
Shedden, G R	Auckland	4 March 1983
Sheehan, P M	Auckland	4 March 1983
Shelly, D J	Auckland	4 March 1983
Shelton-Agar, M P	Wellington	25 February 1983
Shelton-Agar, R J	Wellington	25 February 1983
Shnider, S	Wellington	25 February 1983
Sinclair, C J	Wellington	25 February 1983
Singh, C	Wellington	17 December 1982
Singh, D	Auckland	4 March 1983
Singh, K	Wellington	17 December 1982
Snow, M C	Wellington	25 February 1983
Stewart, S J	Auckland	4 March 1983
Stoikoff, K A	Auckland	4 March 1983
Stollery, W R	Auckland	4 March 1983
Stone, C F	Auckland	4 March 1983
Tait, J G	Wellington	25 February 1983
Tama-Te-Kapua, P J	Auckland	4 March 1983
Taylor, S A	Auckland	4 March 1983
Taylor, S E	Auckland	4 March 1983
Thodey, S M	Auckland	4 March 1983
Thompson, G W	Auckland	4 March 1983
Tisdall, R J	Wellington	25 February 1983
Toye, P J	Wellington	25 February 1983
Va'ai, V	Wellington	17 December 1982
Van Ryn, M M B	Auckland	4 March 1983
Wainwright, C M	Wellington	25 February 1983
Walworth, B	Wellington	25 February 1983
Watson, S M	Auckland	4 March 1983
Wells, R J R	Invercargill	25 February 1983
White, S V	Auckland	4 March 1983
Wigley, B A	Invercargill	25 February 1983
Williams, B C	Wellington	25 February 1983
Williams, J K	Auckland	4 March 1983
Wilson, G J	Auckland	4 March 1983
Worker, R R	Wellington	25 February 1983
Wyeth, A J	Wellington	25 February 1983
Wylie, D S H	Wellington	25 February 1983
Yates, J M	Auckland	4 March 1983
Yee, E A	Auckland	4 March 1983

Courts Administration and the "pressure of time"

Mr J Curran, *the Courts Manager at Wellington comments upon recent publicity highlighting the pressure currently placed on our Court system.*

IN a recent decision of the Court of Appeal (*R v Awatere* CA 95/82 16 December 1982) presented in the *Dominion* newspaper by Penelope Pepperell on 2 February 1983, the question of the obligation of District Court Judges to provide reasoned decisions in all cases was explored. The particular set of circumstances was unusual but the Court in holding here that it should not insist on such a course, laid the blame for the lack of written reasons in this case on "*pressure of time*". It is in this field that the Court administration can play a significant role in a number of ways including:

(a) Insistence on prior consideration before trial, of outstanding issues, the number of witnesses to give evidence, and the estimated hearing time, through the medium of a *pre-trial conference* at which all parties are represented.

(b) Calculated attention to the number of cases put down for any one day for hearing by particular Judges and bearing in mind the information gained through insistence on (a) above.

Due attention given to these matters and a spirit of co-operation between counsel and the Court administration will do much to remove the feeling of "*pressure of time*" as adequate time will have been allowed to hear the case in an atmosphere free from any impediment to a full, unhurried and therefore fair hearing for all concerned.

The Wellington District Law Society Centennial Celebrations in 1979 were marked by the remarkable contributions from Sir David. None who were present that evening in the soft light of Old St Paul's could ever forget his remembrances. The pictures he painted in charming and witty words of his colleagues Skerrett and Bell brought to many a new understanding of our legal heritage.

His legacies to the law include not only his judgments, writings and recorded reminiscences, but also his daughter, who remains a much loved member of our profession. We extend to her and her brother, and to members of Sir David's wider family, the condolences of Wellington practitioners. It can be fairly said that Wellington profession is saddened by his passing, but it has been greatly enriched by the life of a good and just man.

18 There are limitations to any defence of justification at an interim stage of proceedings: *Northern Drivers Union v Kawau Island Ferries Ltd* [1974] 2 NZLR 617, 623.

19 *Australian Conservation Foundation Inc v The Commonwealth of Australia* (1970) 54 ALJR 176; *Montana Wines v Cooks, supra.*

20 For example, see the leading judgment of Myers CJ in *Attorney General v Wilsons (NZ) Portland Cement Ltd* [1939] NZLR 813, 835 (CA).

21 For example, *Elliott v North Eastern Railway Company*, 11 ER 1055; *Parker v First Avenue Hotel Company* (1883) 24 Ch D 282; *O'Sullivan v Mt Albert Borough* [1968] NZLR 1099.

22 See *Codelfa-Cogefar (NZ) Ltd v Attorney-General (Wellington, (A 614/79), 10 September 1980).*

23 For a thorough analysis see Harris, "Interim Relief Against the Crown" (1981) 5 Otago LR 92.

24 *Cutter v Wandsworth Stadium Ltd* [1945] 1 All ER 103, 105.

25 *Chanel Ltd v F W Woolworth & Co Ltd* [1981] 1 All ER 745; *Adam Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 35 ALR 625; *Pacific Natural Gut String Co Ltd v New Zealand Meat Processors IUW* (Auckland, (A 751/82), 8 November 1982).

26 *Erinford Properties Ltd v Cheshire County Council* [1974] 2 All ER 448.

27 Eg *Development Consultants Ltd v Lion Breweries Ltd* (Auckland, A 48/81), 20 July 1981).