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Rape sentencing

Rape must rank among the most heinous of crimes. But because it is a crime the legal system must deal with it in terms of procedure, of onus and standard of proof, and of sentence along with other crimes, all of which in varying degrees are unique affronts to their victim's rights to life, liberty and security of person.

The issue of sentences in rape cases has recently become a political issue in the sense that certain politicians have spoken with simplistic vehemence in the hope of attracting a favourable electoral response. As an issue it is hard to see how it can be a loser. It unites the atavistic demands of the hard liners for "law-and-order" with the radical emphasis of some brands of feminism. And where is the man or woman who wants to run the risk of being branded as being in favour of rape, or even soft on rapists?

It is the responsibility of Courts however to preserve a balance, to see this crime in relation to other crimes, to bear in mind the purposes of punishment, and to avoid the populist excesses of a particular time. The Courts must also have regard to the general penal policy contained in the Criminal Justice Act which is in general intent to avoid long periods of imprisonment. Any legislative action in respect of rape sentencing would presumably have to start there by making rape an exception to the general policy, while not doing so for manslaughter, reckless driving causing death and other such serious offences.

There is also at issue the basic question of what is known as the individualising of sentencing. Professor Julius Stone, in his lecture on "Madness and Guilt" given at the Auckland Law School centennial, and subsequently published, dealt in passing with this topic. He was speaking of the American situation, but his comments are equally applicable here in New Zealand.

> . . . as regards the sentencing process it is virtually a constitutional maxim that sentencing authorities shall exercise discretions, and that this is not satisfied by applying "fixed and mechanical" doctrines based on the comparability of single factors such as the nature of the offence, but requires reference to a range of personal factors in the offender.
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> As the learned writer of a recent note has well observed, "both federal and state courts consider 'individualized' sentencing, as an essential element of procedural due process".

The recent judgment of the Court of Appeal, *R v Puru and Others* (unreported CA86/83, etc, judgment delivered 19 April 1984) shows a careful, thoughtful, principled, sensitive and socially responsible judicial consideration of the question of appropriate sentences for the crime of rape. The judgment was the unanimous decision of all five permanent members of the Court of Appeal together with Hardie Boys J who was sitting temporarily in that Court. The Court was so constituted, as the judgment explains, so that the issue could be seen to be decided with final authority because the Court of Appeal "alone is able to lay down the guidelines and settle the sentencing policy which is ultimately to be followed by the High Court". The judgment should be read in full, but it is worthwhile at this stage to quote extensively from it to show how carefully and reasonably the Court approached its task.

There were six appeals before the Court, 2 by offenders seeking reduction of their sentences, and 4 by the Solicitor-General seeking increases in sentences. It was the Solicitor-General's submission that there should be a change in sentencing policy with a broadly based and significant increase in rape sentences. The unanimous judgment of all six Judges, before going on to deal with other matters, dealt with an historical point about this general submission:

> That is the same argument that his predecessor unsuccessfully addressed to this Court in 1978. It was unsuccessful then but not because the judges need any urging to take a strong line against rape; they have been doing that for a long time as Mr Neazor explicitly recognized. . . .
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> The judges do actually live in society and share with other citizens the same strong feelings concerning the uncivilized abuse and coercion of women which this crime represents. But their judicial obligation is to ensure that the punishment they impose in the name of the community is itself a civilized reaction, determined not on impluse or emotion but in terms of justice and deliberation. Thus the reason why the application was unsuccessful in 1978 was simply because severe prison sentences were being imposed already whenever the facts required it; and because the claim for even greater severity had not been supported by any material at all, statistical or otherwise, which might indicate the need for it. It is necessary to add that if there is any such material then the Courts have now been waiting the five years since 1978 to be informed of it. . . .
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> Nonetheless there have been political pronouncements about the matter with strong extraneous pressure upon [the High Court Judges] to

take individually a much harder line when dealing with cases of rape. Now there is public interest in what is to happen.

The judgment then went on to deal with the earlier cases of *R v Pui* [1978] 2 NZLR 193 and *R v Pawa* [1978] 2 NZLR 190. In the latter case the judgment recalled that it had been said that rape "must inevitably provoke strong and even emotional reactions", and had acknowledged that the "reaction is understandable". In *Pui's* case the Court had expressly stated it would be prepared to consider more severe sentences if evidence, statistical or otherwise, was produced to show the need and the utility of such a judicial policy. In that case the Court made the obvious point that seems so often to be overlooked, that imprisonment "for five or six years is a long time by any standards". The Court in these present cases then went on:

> It may be said at once that the Solicitor-General conceded quite frankly that if the present issue has to be decided on the basis of statistics or other material which would show some reliable trend then he cannot advance the matter further. In other words there is no evidence which would permit any safe conclusion that for policy reasons there is a need for a change in the general approach to punishment in this general field let alone that sentences should be increased in any dramatic way. . . .
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> With the assistance of counsel we have done our best to ensure that we have obtained all the available information which might bear upon the incidence of rape and the significance of one rather than another level of punishment. Contrary to a view that may be widely held there is no clear evidence of any marked increase recently in the level of offending. Nor is there any breakdown in the figures which demonstrates that there has been an increase in the more serious cases or any other information before the Court which would indicate that this has occurred.

In what is probably the most delicate and sensitively written part of the judgment the Court faced up to the particularly difficult issue of race. It is common enough knowledge that Maoris are a tragically disproportionate part of the prison population. This is widely deplored and is itself a fact that causes some degree of racial tension. In the light of this the Court showed courage and clearness of vision in the way in which it dealt with this potentially divisive issue.

> A worrying feature of the statistics which has been brought out in the course of this examination of rape is the unusually large number of young Maori offenders. Indeed it is an unhappy fact that five of the six cases now before the Court are in this category. A study of police files undertaken in relation to a recent Justice Department examination of the whole problem of rape indicates that as many as 45 percent of offenders are Maori. The figure in itself cannot be regarded as definitive but it does point to a difficult problem. It appears to be a relatively recent phenomenon. Earlier statistics may confirm this and show that in social terms things have gone wrong in the intervening years. In any event the reason clearly must lie in sociological areas which it is not possible or appropriate for this Court to examine or even comment upon. Rather it is a matter for careful research with the objective of removing whatever may be the underlying cause. In the absence of any adequate data it is equally clear that the Court should hesitate long before increasing a general level of sentencing which would bear particularly heavily on one section of society or tend to single out young Maoris as a racial group.

The Court then went on to consider the position in England. Nine recent cases were analysed by way of example. In England sentences between 3 and 5 years were considered appropriate, with sentences up to 8 years for group rape or where there had been a high degree of violence. It was only in what could be regarded as very exceptional cases that there would be sentences of over 8 years.

In the cases before the Court of Appeal the sentences imposed ranged from 8½ years in effect, to 2 years. All appeals were dismissed; but the 2-year sentence was considered too light. It would have been increased were it not that the offender's term had almost been served and he was due for early release. The Solicitor-General accordingly did not ask for an actual increase in sentence but merely an indication that this sentence was considered inadequate. This the Court did. Before going on to deal specifically with the circumstances of the six appeals before the Court, the judgment stated 9 general conclusions which need to be quoted in full.

> 1 No case for change in sentencing policy can be made out on the statistical material which has been presented to the Court. That is a situation which the Solicitor-General himself conceded at the outset.
> 2 Over the last ten years there has been a gradual upward movement both in the number of convictions and in the complaints made to the police. But there is no real evidence of any marked increase recently in the level of offending.
> 3 There has been an upward trend over the last five years in the severity of sentences especially for the kinds of rape which have particularly aggravating features: some 37 percent of all sentences are of 5 years imprisonment or more. Unfortunately this increase has not had any beneficial effect on the number of convictions.
> 4 The approach adopted by the New Zealand judges and the general level of sentencing in this country are paralleled in English sentences.
> 5 There is no evidence in all the research that has been done here and in other countries which suggests that anything is achieved in a significant way to deter future rape offences when punishment that is already severe is made harsher still.
> 6 Society utterly rejects offending of this kind as the disgraceful exercise of physical power over the victim and degradation of her human personality. Sentences for rape are intended to demonstrate society's condemnation of that conduct.
> 7 The judges, themselves concerned members of society, have regularly reflected those paramount considerations in discharging their judicial sentencing responsibilities.
> 8 Society is entitled to exact a severe penalty from the offender so as to mark its condemnation of his

> conduct. At the same time society rightly expects the courts to react justly when weighing up all the relevant sentencing considerations. The sentence should be no more as well as no less severe than is justified and required for the protection of women, to mark rejection of such offences, and to punish the offender.
> 9 In this area of punishment no significant upward change could be embarked upon in the name of any responsible community without much more cogent material and argument than the Crown has been able to place before this Court. In that situation there is no justification for requiring a general increase in the level of sentences.

This is a carefully reasoned judgment and is responsive to the complexity of the issues involved. It would be unfortunate if politicians including some Cabinet Ministers continue their campaign for tougher sentences in rape and other cases, and in denigration of the Judges. Particularly to be deplored are remarks such as those made earlier by the vehement Mr Banks with his denunication of the Judges as

> weak-kneed judicial officers who let the police down time and time again . . . spending too much time mollycoddling the thugs.

It is to be hoped that the Attorney-General, by virtue of the office he holds, will accept his responsibilities to the legal system despite the views of some of his colleagues. By convention he can be expected to be the member of the Government who will seek to explain to other Parliamentarians the role of the Court and the reasoning of its judgment, even if he is not prepared to defend the integrity and responsibility of the Judges in public as lawyers are entitled to expect an Attorney-General to do as titular head of the legal profession.

Shortly after the judgment was given Mr Justice Hillyer had occasion to comment when sentencing four young men to imprisonment for four years on a charge of rape. His Honour is reported as having said:

> Judges must reflect the community's attitude to offences of this nature. Although I must confess on occasions some of the more vociferous and strident calls for savage sentences in cases of this kind make me wish those people making the comments had to sit through the trial, understand what happened, read the probation officers' reports and themselves make the decision as to how long each young man has to be kept out of the community and the effect it will have on him.

The judgment of the Court of Appeal in these cases is an important one. It deals, clearly and seriously with the issue on its merits as an integral part of the New Zealand system of criminal justice. This is the true significance of the judgment. And incidentally in dealing with these various appeals in the way they did the six Judges, Woodhouse P, Cooke, Richardson, McMullin, Somers and Hardie Boys JJ showed to the full, as the legal profession could expect, the essential independence of the Judges and the true meaning of the oath they took on assuming judicial office to

> do right to all manner of people after the laws and usages of New Zealand without fear or favour, affection or ill will.

P J Downey

Case and Comment

Contract — Damages

In *C & P Haulage (the firm) v Middleton* [1983] All ER 94, a contractual licensee expended money in making premises suitable for his work. The licensee was unlawfully ejected from the premises by the licensor and sought damages representing the costs of the improvements. The Court of Appeal accepted that the licensor had acted in breach of contract but considered that the licensee had suffered no loss. Accordingly, only nominal damages were awarded. This was because the licensee had no right to remove the fixtures put in by him when the licence expired.

In a previous case note ([1983] NZLJ 169) the various types of damages that may be awarded in a contractual action were briefly discussed, as were the difficulties which sometimes ensue from using labels to describe them. This case is briefly noted because, in fairly simple terms, it illustrates that damages issues can be considered without the need to use labels and because it demonstrates that although "expectation" damages are the norm in contract actions, "reliance" damages are also proper damages to be awarded. The caveat on the award of reliance damages is that these damages should not exceed any expectation damages that might otherwise be awarded.

Specifically, in the present case, as the plaintiff licensee had sufferd no loss in terms of his expectation (because the improvements made by him could not have been removed by him when the licence expired) it would have been improper to grant him damages representing the costs of the improvements by way of reliance damages. As Ackner LJ said:

> The law of contract compensates a plaintiff for damages resulting from the defendant's breach; it does not compensate a plaintiff for damages resulting from his making a bad bargain. . . . If the law of contract were to move from compensating for the consequences of breach to compensating for the consequences of entering into contracts, the law would run contrary to the normal expectations of the world of commerce. The burden of risk would be shifted from the plaintiff to the defendant. The defendant would become the insurer of the plaintiff's enterprise. . . . The fundamental principle upon which damages are measured under the law of contract is restitutio in integrum. — ibid, p 99.

S K Dukeson

The Companies Amendment Act 1983 (No 2)

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1 Company Capacity

The law relating to the legal capacity of a company incorporated under the Companies Act 1955 has attracted heavy and sustained criticism over the last one hundred years or so. Indeed, the attacks have been so widespread that few lawyers would not be aware that the so-called "ultra vires" doctrine has long been in urgent need of reform.[1] As we shall see, New Zealand has lagged behind the rest of the Commonwealth in enacting statutory reforms. The current amendment is in fact drawn from many of these predecessors.

Briefly, the ultra vires doctrine limits the capacity of a company by reference to the purposes for which it is formed (as revealed in the Memorandum of Association), rendering void any transaction not expressly or impliedly authorised by its stated objects or by the Act.[2]

The original avowed purpose of the doctrine was to protect shareholders and creditors alike by ensuring that only limited activities could be pursued. Prospective investors could then know exactly what sort of business they were investing in, and creditors would know what sort of activities they were financing. *Ashbury Railway Carriage & Iron Co v Riche* (1875) LR 7HL 653, 667-8 per Lord Cairns LC.

It is notorious, and has been almost from the birth of ultra vires, that those objects have not been achieved. The decided cases have revealed that draftsmen of Memoranda found the doctrine to be no more than a nuisance, and, moreover, a nuisance that could be mitigated or even avoided altogether by the use of various drafting devices, most of which were accepted, albeit reluctantly on occasion, by the Court.[3]

The result has been that shareholders of a company cannot usually gain an accurate idea of the limits of a company's powers by examining the Memorandum. They must, generally speaking, go along with any changes of business which the whim of the Board of Directors dictates. Similar problems face creditors.[4] In fact, as regards creditors, the doctrine can operate particularly painfully, as was amply illustrated by *Re Jon Beauforte (London) Ltd* (1953) Ch 137. This seems strange when one considers that the doctrine is supposed to protect creditors.

Eventually, the doubts over ultra vires crystallised into legislative change, in Canada, England, Australia,[5] and now in this country. The 1982 Amendment (No 2) provides for new ss 15A, 16 and 18A in the main Act. Broadly, the scheme of the changes is as follows:

(a) A company registered after 1 January 1984 will have the "rights, powers and privileges" of a natural person; (b) However, certain groups of persons may still plead that the company has acted ultra vires. These groups are shareholders, debenture-holders (and trustees therefor), the company itself, or the Registrar of Companies.

(a) Company a natural person

Having designated the company a natural person, the new s 15A then lists particular powers, but "without limiting the generality" of the fact of the widened capacity. These powers are as follows:

(a) Issue and allot fully or partly paid shares in the company.
(b) Issue debentures of the company.
(c) Distribute any of the property of the company among the members, in kind or otherwise.
(d) Give security by charging uncalled capital.
(e) Grant a floating charge on the undertaking or property of the company.
(f) Procure the company to be registered or recognised as a body corporate in any place outside New Zealand.
(g) Make provision in connection with the cessation of the whole or a part of the business of the company, or of any subsidiary of the company, for the benefit of employees or former employees of the company or of a subsidiary of the company or for the dependants of such employees or former employees; and
(h) Do any other act that it is authorised to do by any other enactment or rule of law.

It may have been thought unnecessary to enumerate these objects, once having designated the company as a natural person for these purposes. The reason is simply that for the new law to equate the powers of a company with those of a natural person would not be enough, for there are some things which a company may do which are not possible for a natural person. Therefore, s 15A sets out specific powers.

That being so, most of the specific objects are unremarkable. However, two of them call for individual treatment:

(i) Subsection (1)(c) allows the company to distribute its property to the members, in kind or otherwise.[6] This is very generally worded. One must conclude that it was not intended to allow a distribution of property that was not previously legal. Therefore, the common law rules about dividends should

still apply. Similarly, subs (1) is subject to the other provisions of the Act, including the capital reduction sections. Doubts remain however, in view of the general wording. If any distribution of property was hitherto illegal because it was ultra vires the company,[7] then could one argue that it is now legal?

(ii) Subsection (1)(g) allows provision to be made for company employees or dependents upon cessation of business. Subsection (2) provides that this power may be exercised "whether or not it is in the best interests of the company". This in fact gives a clue to the meaning to be attached to subs (1)(c). The argument is that all powers except that in subs (1)(g) must be exercised for the benefit of the company. Subsection (2) effectively frees this power to provide for employees from the need to show that in so doing one is also benefiting the company.[8] If one wished to enter upon a wider argument, it could always be said that to provide for employees will always benefit the company, if only in some intangible sense.

In line with the foregoing, s 15A(3) provides as follows:

> (3) The memorandum and articles of a company shall not contain any provision with respect to the rights, powers, and privileges of the company except a provision that restricts or prohibits the exercise by the company of any of the rights, powers, and privileges referred to in subsection (1) of this section.

As will be seen, although such restrictions may be contained in the memorandum and articles, any breach of them will have a restricted effect vis a vis the capacity of the company to legally bind itself to a particular transaction. Finally, the new s 16 further complements s 15A by providing in effect that the Second Schedule "incidental and ancillary" objects and powers shall only continue to be applicable to those companies registered before 1 January 1984. However, s 15A(5) provides that such a company may render s 15A applicable to it if it alters its memorandum pursuant to s 8(1)(c) (to be discussed at a later stage) by omitting the provisions with respect to the company's powers and resolving that the company shall have the rights, powers and privileges of a natural person (including the powers listed in s 15A(1)(a) to (h). If that is done, then s 16 will not apply to such a company.

(b) Insiders May Intervene

The new section 18A of the Act provides firstly:

> (1) Nothing done by a company and no conveyance or transfer of any property, whether real or personal, to or by a company shall be invalid, void, or unenforceable by reason only of the fact that the company was without capacity or power to do it, or to execute, or give, or take such conveyance or transfer.

(the sub-section operates retrospectively: see subs (5).)

This provision would seem at first to be superfluous, in the light of s 15A. However, the intention of Parliament becomes clear when one considers two factors:

(i) Section 18A allows certain groups to plead ultra vires (see below). The end result is that the company is a natural person for these purposes, so that "outsiders" cannot plead ultra vires. Corporations created by charter or letters patent were thought to have the powers of a natural person. However, this did not preclude actions by some groups to either punish or restrain an act beyond the powers set out in the charter or letters patent. The combined effect of s 15A and 18A is to basically achieve the same result;

(ii) Section 15A(3) allows restrictions on capacity to appear in the articles or memorandum, but the effect of s 18A(1) is to render a breach of such restrictions a matter for "insiders" only to call into question.

As to subs (1), there is at the outset some question as to how it operates in conjunction with the rules of agency: As has been noted, any limitation on a company's powers in the memorandum is constructively noticed by outsiders dealing with the company; so is any limitation on the authority of a company's agents. Subsection (1) only operates where there is an act of the company. One could therefore argue that there could be no act of the company because the outsider has constructive notice of the limitation of authority, so that there is no act of the company to be validated by subs (1). Such a difficult result can be avoided by reading the provision as referring to any act of a company or act on its behalf by an organ or agent without regard to limitations on their powers implied in the ultra vires doctrine.

Since the abstract corporate entity cannot act the subsection must refer to acts of individuals acting for it which would be effective to bind the company. If the acts of such persons would bind the company in the absence of the ultra vires doctrine then it would seem that the company's act is validated.[9]

Secondly, subs (2) sets out the groups who may still plead ultra vires:

> (2) Nothing in subsection (1) of this section shall apply:
>
> (a) In any proceedings against the company by any member of the company, or where the company has issued a debenture or debentures secured by a floating charge over all or any of the company's property, by the holder of any of those debentures or the trustee for the holder of those debentures –
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> (i) To prevent the doing of any act, or the conveyance or transfer of any property to or by the company on the ground that the company is without capacity or power to do the thing or to execute or take such conveyance or transfer; or
>
> (ii) To obtain any other relief on the ground that the company was without capacity or power to do such thing, or to execute or take such conveyance; or
>
> (b) In any proceedings by the company or any member of the company against any officer or former officer of the company as a result of any thing done by the company or the conveyance or transfer of any property to or by the company on the ground that

the company was without capacity or power to do such thing or to execute, give, or take such conveyance or transfer; or

(c) In an application by the Registrar for the winding up of a company.

Some points may be made about subs (2):

(i) Unsecured creditors are not included. They may not, therefore, resist a claim by the company to enforce a legal obligation on the ground that the company had no capacity to enter into the transaction.[10] However, a member or debenture-holder of the company may affect the creditor's rights by having a transaction prevented or set aside: See *Forbes v NSW Trotting Club* (1977) 2 NSWLR 515. The creditor's only hope here is for an award of compensation under s 18A(3).

(ii) The liquidator of the company is not expressly mentioned. However, there is authority, albeit thin, for the proposition that "the company" includes the liquidator, or even, in some circumstances that "member" includes liquidator: See *Re Halt Garage (1964) Ltd* (1982) 3 All ER 1016, 1036 F-G per Oliver J (as he then was).

(iii) Subsection (2) does not expressly refer to a debenture-holder who is secured, not by a floating charge, but by a charge over some specific asset of the company.

Thirdly, subs (3) provides that where a member of debenture-holder seeks to prevent the company from committing an "ultra vires" act, the Court may, in addition to making the order, grant such relief as it thinks just in respect of loss or damage suffered by any party to the "contract" as a result of the company having been prevented from performing it. Two points might be noted about subs (3):

(i) It does not give the third party the right to compensation in respect of a completely performed act. By contrast, if a shareholder suffers loss in such circumstances, he might have available to him the alternative course of a derivative action against the directors;

(ii) Subsection (3) is expressly limited to "contracts". It thus provides no means for compensation in a situation where, for instance, a gift is made to an employee, which is not authorised;

(iii) The Court's jurisdiction under subs (3) is plainly of an equitable nature. A party's knowledge of a company's lack of capacity at the time the transaction is entered into will presumably be a factor which the Court will consider in exercising its discretion whether to grant compensation. Parties are still deemed to have constructive notice of registered memoranda and articles. In other words, the failure to abrogate the constructive notice rule may work unfairly in such a situation;[11]

(iv) In any event, subs (4) provides that the Court may not grant relief in respect of the loss of anticipated or future profits.

As has been noted, the above reforms have been prompted by a flood of criticism of the old ultra vires doctrine. There was, though, some disagreement amongst law reform agencies as to how the reforms should be framed. For instance, the Cohen Committee was in favour of a company having the powers of a natural person. Most recently, in New Zealand the Department of Justice has simply recommended the "abolition" of the ultra vires doctrine.[12] Those who support this reform would argue that it will reduce legal fees incurred by companies in the drafting of comprehensive affirmative statements of objects. It will also reduce difficulties for firms wishing to change their line of business quickly. The reform will encourage inquiries as to what business the company is engaged in from sources other than the memorandum, although this was arguably the case already.

On the other hand, the Jenkins Committee, in its 1962 Report,[13] and the MacArthur Committee, both had misgivings. They thought that the reforms would dramatically and unjustifiably enhance the power of the Board. Investors would, so it was said, be subject to the Board's whims as regards changes of business. "An investor has the right to know, in general terms, what his money is to be used for:" MacArthur para 91. There are several answers to this. Firstly, constraints on managerial authority have already been circumvented by drafting devices, such as "Bell Houses" clauses; secondly, it is inappropriate to deal with problems of directors' powers by retaining rules dealing with the capacity of the company; thirdly, investors simply do not rely on objects clauses to tell them what activity a company is carrying on. Indeed, given the way in which modern objects clauses are drafted, they are more misleading than informative; fourthly, members still have the right to plead ultra vires in some circumstances.

The reform is, on the whole, very welcome. However, questions remain about whether justice has been done to unsecured creditors. This is nothing new, since, although the old ultra vires doctrine was avowedly to protect creditors, there was always doubt as to their locus standi to attack an ultra vires transaction. Their contractual rights are liable to be upset, but they cannot recover the full contractual measure of damages. In fact, the creditor is in a difficult position because he will not be sure whether his contract will be set aside or not. It is in what could be called a state of perpetual voidability.

Finally, lest anyone should regret the passing of ultra vires in its old form, it should be remembered that it will remain in all its glory, but only for limited purposes. At least the learning of the last one hundred years or so will not be entirely wasted!

2 Other provisions regarding the Memorandum

The Act inserts a new s 14 into the principle Act. The changes contained in the new s 14 are as follows:

(a) Each subscriber to the memorandum was formerly required to write opposite to his name the number of shares he takes. The new provision requires him to do this "in his handwriting in words. . .". This is adopted pursuant to a recommendation of the MacArthur Committee, para 68, in turn based on a provision in the Australian Uniform Companies Act. The reasoning behind this is

basically that if a subscriber has to write the number of shares taken, in his own handwriting, then it will not be unfair for him to be held to this number, since he will be taken to have been aware of the facts. There would, therefore, be nothing unfair in not allowing him to repudiate his membership on the ground of fraud or misrepresentation. See *Petrolite and Challenge Heaters Ltd v Bodley* (1924) NZLR 102.

(b) The new provision also allows for the subscriber to have an agent authorised in writing sign the memorandum on his behalf;

(c) Where a corporation is a subscriber, the number of shares taken by that corporation may be written by either (i) a witness to the affixing of the seal of the corporation to the memorandum; or (ii) any person who signs the memorandum pursuant to s 15(2).

A new s 14A is inserted. This provides that a memorandum may state, but shall not be required to state, the objects of the company. The relationship of s 14A with the new provisions regarding the ultra vires doctrine require to be stated. Section 14A must be read in the light of those provisions, and in particular s 15A(3), which provides that the memorandum shall not contain any provision with respect to the rights, powers and privileges of the company. A distinction must therefore be drawn between "objects" on the one hand, and "rights, powers and privileges" on the other. Such a distinction is already recognised in the caselaw: See *Re Introductions Ltd* (supra). The point here is that although a company may state its objects, a failure to conform to them will only have a restricted effect, as a result of s 18A. The statement of objects may, therefore, amount to little more than a publicity exercise.

The Act inserts a new s 18, dealing with the alteration of objects in the memorandum. Obviously, such a provision will be of limited relevance, again because of s 18A. If a company's acts cannot be attacked on the ground of ultra vires, it will not matter in some cases that the company changes its line of business without altering the memorandum. On the other hand, s 18A allows for such attacks by certain persons, and in the case of such persons, it will of course be relevant to inquire as to the objects in the memorandum.

It is well known that the previous s 18 was unduly restrictive, in that any proposed alteration had to come within one of the specified grounds, and it also required to be confirmed by the Court. These grounds were strictly interpreted by Somers J in *Re W Gregg & Co Ltd* (1977) 1 NZLR 306, where His Honour held that the proposed addition to the memorandum of a *Cotman v Brougham* clause did not come within any of the specified grounds.

The MacArthur Committee alluded to these defects. They stated that as long as adequate protection is given to dissentient shareholders and creditors there was no sufficient reason why a company should not be permitted to change its purpose at will. They recommended in paras 102-103 that such protection could be achieved by (a) requiring a special resolution; (b) giving adequate notice of the resolution to creditors, as well as shareholders; (c) providing for public notice of the nature of the change; (d) rights for aggrieved shareholders or creditors to apply to Court to have the alteration set aside.

Accordingly, s 18 provides for a special resolution to alter the memorandum. It must be noted that s 18(1A) provides that where the memorandum contains a provision which could lawfully have been contained in the articles, then the company may also alter such provisions by special resolution. However, an exception to this in the case of class rights is provided for in ss (1C). These may not be altered by special resolution. The reason is basically that the Articles will usually contain a "variation of rights" clause, which commonly provides for the consent of three-quarters of the affected class to be obtained to any variation of the rights of that class.[14]

Section 18(2) provides for the requisite notice to be given to members, trustees for debenture-holders, debentureholders where no trustee has been appointed, local newspapers and the *Gazette* and to the Registrar. Note that no notice goes to the unsecured creditors! Subsection (4) provides for rights of objection to be given to groups composed of holders of at least 10 percent in nominal value of the issued shares, or 10 percent in nominal value of debentures. In addition, any member or creditor may object with the leave of the Court. The proposed alteration will have no effect until it is confirmed by the Court: subs (5). The Court may confirm or cancel the alteration, on such terms and conditions as it thinks fit. Alternatively, it may adjourn the proceedings to allow an arrangement to be arrived at whereby the dissentient members are bought out: subs (7). In exercising its powers, the Court is enjoined to have regard to the rights and interests of (i) the members, or any class thereof; and (ii) the creditors; and (iii) any other matter it thinks fit.

A new s 26 is enacted. This section deals with the documents required to be registered. It was pointed out to the MacArthur Committee that the old s 26 only mentioned the memorandum and articles of association as having to be delivered to the Registrar for registration, whereas other sections of the Act require other documents to be filed at the same time or within a short time after registration. These include Declaration of Compliance, Notice of Registered Office, and a List of Directors. The Committee recommended in paras 70-71 that the section be amended to provide for these other documents, and this is now achieved.

3 Pre-incorporation contracts

At common law a company is incapable of contracting prior to its incorporation. Nor, once incorporated, can it become liable on or entitled under contracts purporting to be made on its behalf prior to incorporation; for ratification is not possible at common law when the ostensible principal did not exist at the time when the contract was originally entered into: See *Kelner v Baxter* (1866) LR 2 CP 174; *Natal Land Co v Pauline Syndicate* (1904) AC 120.

As a result, two possibilities existed: either there was no contract at all, or the "agent" who purported to make the agreement on the company's behalf was personally liable on the contract (or liable for breach of warranty of authority). Which result was arrived at depended upon the intentions of the parties, although there was usually a presumption of personal liability: *Black v Smallwood* (1966) 117 CLR

52 (mistaken belief that company had been incorporated negativing any intention to render the "agents" personally liable). By contrast, in *Kelner v Baxter* both parties knew that the company was not in existence. See also *Hawkes Bay Milk Corp Ltd v Watson* (1974) 1 NZLR 236; and *Rita Joan Dairies Ltd v Thomson* (1974) 1 NZLR 285. See *Marblestone Industries Ltd v Fairchild* (1975) NZLR 529, 539 per Mahon J on the question of personal liability.

It was widely felt that the common law rules were highly technical and inconvenient. The MacArthur Committee recommended in paras 105-107, (i) that the company be able to ratify a pre-incorporation agreement and thereby become bound by and entitled to the benefit of it as if it had been in existence at the time the contract was executed; (ii) that prior to ratification, the "agent" should in the absence of express agreement to the contrary be personally bound on the contract and entitled to the benefit thereof.

A new s 42A reforms the common law rules with regard to pre-incorporation contracts. The reforms largely parallel previous Canadian amendments.[15] The section applies to both contracts made on behalf of a proposed company, as in *Kelner v Baxter*, and contracts made in the name of the company, as in *Black v Smallwood*: subs (1). Subsection (2) provides broadly, that the company may ratify a pre-incorporation contract, either within such period as may be specified in the contract, or, if no such time is specified, within a reasonable time after the incorporation of the company. The company thereby takes the benefits and burdens of the contract as if it were an original party thereto. Subsection (3) provides that ratification for these purposes may be achieved in the same manner as a contract may be made by a company under s 42, that is, either orally or in writing by its authorised agents, or under the common seal of the company. One wonders why there was no provision made here for an implied ratification by conduct.

The Canadian Federal provision in s 14(2) provides for ratification by "any action or conduct signifying its intention to be bound by the contract". Of course, such a provision would be a little vague. For instance, it leaves unanswered the questions of who has authority to signify the corporations intention to be bound and when such intention will be imputed. To clarify this it could be provided that a company is deemed to have ratified whenever it has received substantial benefits or there has been substantial performance by the contracting party under the contract, unless the contracting party in performing the contract had reasonable grounds for believing that the company would not ratify it. In answer to the criticism that it is burdensome to bind a company to a contract which it has not expressly affirmed, it could be argued that the company's recourse should in such a case be against the promoter, and not the other contracting party.

Subsection (4) provides as follows:

> (4) Notwithstanding any enactment or rule of law, in a contract to which this section applies, unless a contrary intention is expressed in the contract, there is an implied warranty by the person who purports to make the contract in the name of, or on behalf of, the company –
>
> (a) That the company will be incorporated within such period, as may be specified in the contract, or if no period is specified, then within a reasonable time after the making of the contract; and
>
> (b) That the company will ratify the contract within such period as may be specified in the contract, or if no period is specified, then within a reasonable time after the incorporation of the company.

The measure of damages for breach of such a warranty is declared by subs (5) to be:

> (5) The amount of any damages recoverable in an action for breach of the warranty implied in any such contract shall be the same as the amount of damages that would be recoverable in an action against the company for damages for breach by the company of the unperformed obligations under the contract as if the contract had been ratified and cancelled.

Furthermore, subs (8) provides for the discharge of a person's liability under subs (4):

> Where a company after its incorporation, enters into a contract in the same terms as, or in substitution for, a contract to which this section applies (not being a contract ratified by the company under this section).

The position, therefore, is that the "agent" may be liable in damages to the extent of the unperformed obligations under the contract, and liable as a party thereto,[16] whereas previously he may have been personally liable as a party on the contract, and also liable for breach of warranty of authority. At first sight this would seem to mean that the "agent" takes the liabilities, without at the same time being entitled to the benefits of the contract.

However, under subs (6) the Court is given power to make certain orders, on the application of any party to the contract (which presumably includes the agent, in cases where the company does not ratify). The subsection provides that the Court may make any order or grant such relief as it thinks fit, whether or not an order has been made under subs (5). Therefore, the agent bears the risk of non-ratification, but he may also be entitled to recover from the company the value of any benefit which the corporation obtains as a result of the contract. The mere receipt of benefits by a company under a pre-incorporation contract will render the company liable to reimburse the agent, but will not, of course, constitute implied ratification of the contract.

Subsection (6) will operate also in the situation where the company has not adopted the contract, the agent is insolvent, and the company has benefited from the contract. The contracting party may then recover from the company under subs (6).

Subsection (7) will also prevent injustice from occuring. It provides as follows:

> (7) In any proceedings against a company for breach of a contract to this section applies and which has been ratified by the company, the Court may, on the application of the company, any other party to the proceedings, or of its own motion, make such order for the payment of damages or other relief, in addition to or in substitution for any order which may be made against the company, against any person by whom that contract

was made in the name of, or on behalf of the company, as the Court considers just and equitable.

Therefore, in a situation where the company has ratified the contract but has no resources, in contrast with the agent who controls the company and fares well on the transaction, it would have been inequitable to prevent the contracting party from recovering from the agent. By virtue of subs (7) he may now recover. The fact that the Court may act on its own motion under subs (7) presents us with the attractive possibility that there may in any case be achieved an apportionment of liability between the agent and the company, in a just and equitable manner.[17]

Miscellaneous

(1) Registrar's power of inspection

Section 9A of the Act is amended in the following particulars:

(a) Section 9A(1)(a) gives to the Registrar power to require a company or its officers to produce certain company documents for inspection, in order that he might ascertain whether the company or its officers has complied or is complying with the Act, or whether he should exercise any of his rights or powers under the Act, or in order to detect offences against the Act. Subsection (1)(b) in its old form, allowed him, in addition, access to any other materials containing "information relating to money or other property managed, controlled, supervised, or held in trust by the company", where he considered that the above purposes could not be achieved, having access only to the materials specified in subs (1)(a). He may now also have this additional access where the documents specified in subs (1)(a) are not produced for inspection. He may require any person (including an employee of a Government Department) to produce such materials. However, nothing in s 9A(1) limits or affects the Inland Revenue Department Act 1974 or the Statistics Act 1975. Both of these Acts contain their own provisions with regard to secrecy. For instance, the Inland Revenue Department Act basically confers confidentiality in respect of any matters relating to the Inland Revenue Acts, the Accident Compensation Act 1972 and the New Zealand Superannuation Act 1974, while the Statistics Act contains secrecy provisions also.[18]

(b) Subsection (1) will now apply also in relation to any registers, records, accounts, books, or papers of a person carrying on the business of banking so far as they relate to the company's affairs: subs (3). Thus a fresh qualification is introduced to the principle that a bank must maintain secrecy with regard to its customers' accounts, etc: See *Tournier v National Provincial and Union Bank of England* (1924) 1 KB 461. In that case the Court of Appeal expressly recognised an exception to the secrecy principle where "disclosure is under compulsion by law" (Bankes LJ at 471).

(c) Finally, subs (6) provides as follows:

(6) Notwithstanding anything in subsections (4), (5), and (7) of this section, the Registrar shall maintain and aid in maintaining the secrecy of all matters that come to his knowledge as a result of any inspection made under subsection (1) of this section, and shall not communicate any such matters to any person except –

(a) For the purpose of, or relating to –
  (i) Carrying this Act into effect; or
  (ii) Any criminal proceedings; or
  (iii) The enactment or proposed enactment of legislation relating to a particular company or group of companies; or
  (iv) The liquidation of any company to which an inspection under subsection (1) of this section relates; or
(b) To the Official Assignee in bankruptcy; or
(c) To any person to whom it is desirable that such matters should be communicated in the public interest; or
(d) To any person to whom the Registrar is satisfied has a proper interest in receiving such matters.

(2) Conclusiveness of Certificate of Incorporation

The Macarthur Committee recommended in paras 74 to 76, two changes to s 29 of the Act. Firstly, s 29(1) provided that the Certificate of Incorporation was conclusive evidence that all of the registration requirements had been complied with "and that the association is a company authorised to be registered and duly registered under the Act". It was submitted to the Committee that the words "authorised to be registered" could conflict with the basic requirement of s 13, namely that the persons forming a company must be associated for a lawful purpose. The Committee therefore recommended that the offending words be deleted from s 29(1), and this is now achieved; secondly, it was thought that the Declaration of Compliance provided for in s 29(2) was very much a mere formality, and could be dispensed with therefore. Section 29(2) is now repealed.

(3) Company names

Name approval is one of the Registrar's most difficult functions.[19] These difficulties were caused in large part by the manner in which s 30, which set out the Registrar's powers with respect to approval of names, was framed. Firstly, the Registrar was enjoined by s 3(1) not to register a name which was "identical with that of a company carrying on business in New Zealand . . . or so nearly resembles that name as to be calculated to deceive", except where the potentially aggrieved company gave its consent and the Registrar saw nothing in the matter as being contrary to the public interest. Secondly, in s 31(1) and (2) a number of specific names were restricted or prohibited altogether.

Thirdly, under s 31(3) the Registrar had a discretion to refuse to register a company by a name containing a trademark registered under the Trade Marks Act 1953, or any words which in his opinion are so closely resembling that trademark as to be calculated to deceive or cause con-

fusion. Fourthly, under s 31(4) the Registrar had a residual discretion to refuse registration of undesirable names.

Given the volume of applications for approval of company names, it was patently unreasonable to require the Registrar to be concerned with the wording of each of these restrictions. The MacArthur Committee recommended an adoption of the Australian system whereby the Registrar has a general discretion to refuse the registration of a name which in his opinion is undesirable, or which has been declared to be unadvisable by the Governor-General by Order in Council. This recommendation now forms s 31(1).[20]

Subsections (3) to (8) provide for a new system whereby a company name may be "reserved" for a period of three months, as long as subs (1) is satisfied, in the case of a company or overseas company intended to be formed, or intending to change its name. There is no objection to provision for such a system. However, subs (4) provides that no company may be registered under the Act, or have a name change approval under s 32, unless a prior reservation of name has been made pursuant to the above provisions. Solicitors will argue that this is just another matter with which they must be concerned upon the formation of a company. It could certainly be asked why it was deemed necessary to make reservation a compulsory prerequisite to registration. Surely an "enabling" provision would have been sufficient? □

1 See generally, Farrar (1978) 8 NZULR 164.

2 Contrast the position of companies registered under the Companies Act 1955, with corporations created by charter, or by letters patent. The authorities clearly show that the latter two types of company have the powers of a natural person. However, if they exceed the powers set out in the charter or letters patent, then proceedings may be brought by way of quo warranto to restrain the breach, or by scire facias to revoke the charter or letters patent: See *Sutton's Hospital case* (1612) 10 Co Rep 1; *Bonanza Creek Gold Mining Co v The King* (1916) All ER Reprint 999, 1007.

3 It will suffice to merely mention *"Cotman v Brougham"* clauses, *"Bell Houses"* clauses, or simply the practice of adopting exhaustive lists of objects. At least a token limit was asserted by Harman LJ in *Re Introductions Ltd* (1969) 1 All ER 887, when he said at 888 that a company "cannot have an object to do every mortal thing one wants, because that is to have no object at all".

4 For a summary of these defects, see Report of the Cohen Committee CMND 6659, para 12.

5 See British Columbia Companies Act 1973, ss 23-27; Ontario Business Corporations Act 1970, ss 15-16; Canadian Federal Business Corporations Act 1974, s 16; European Communities Act 1972 (UK), s 9; Uniform Australian Companies Act 1981, s 68; Australian Companies and Securities Legislation (Miscellaneous Amendments) Act 1983, s 67.

6 The wording is identical to that in the Second Schedule, cl 23.

7 For example, In *Trevor v Whitworth* (1887) 12 App Cas 409 the House of Lords held that a company could not purchase its own shares (a transaction involving a distribution to members) because it was ultra vires.

8 See *Re Lee, Behrens & Co Ltd* (1932) 2 Ch 46 per Eve J at 51-52. However, more recent cases have tended towards the view that corporate gifts do not depend on this test. Rather, they depend upon their being expressly or impliedly authorised by the Memorandum. See *Re Halt Garage Ltd* (1982) 3 All ER 1016, 1025; *Re Horsley & Weight Ltd* (1982) 3 All ER 1044, 1054; *Rolled Steel Products Ltd v British Steel Corp* (1982) 3 All ER 1057. However in light of the fact that ultra vires is no longer an issue, subs (2) is appropriate to remove any other doubts about the validity of provision for employers.

9 See Ford: Principles of Company Law, 2 ed 100, and *Re Edward Love & Co Pty Ltd* (1969) UR 230.

10 See, however, *Hawkesbury Development Co Ltd v Landmark Finance Pty Ltd* (1969) 2 NSWR 782, where Street J thought that the shareholder, under the equivalent Australian provision, only had standing to prevent the occurence of an ultra vires transaction, and not to set aside a completed transaction. He did so on the basis that the company could not sue to recover assets disposed of in a transaction. Since this was so, the shareholder could not recover what the company was unable to recover, simply by bringing the action in his name, since to do so would be to undermine the Rule in *Foss v Harbottle* (at 797). However, the Australian provision does not contain the extra means of redress open to a shareholder in s 18A(2)(a)(ii). It is submitted that this renders the decision of Street J inapplicable in New Zealand.

11 Compare the Canadian Business Corporations Act 1974, s 17, which does abolish the constructive notice rule.

12 Discussion Paper – Company Registration Requirements, December 1982.

13 CMND 1749, para 39(v).

14 See Third Schedule, Table A, cl 4.

15 See Ontario Business Corporations Act, s 20, and Canada Business Corporations Act, s 14.

16 It may, however, avoid liability under subs (4) by inserting a clause in the contract disclaiming such liability.

17 Section 42B confers jurisdiction also on District Courts to exercise the powers in s 42A where:
(a) The occasion for the exercise of the power arises in the course of civil proceedings properly before the Court; or
(b) The amount of the claim or the value of the property or relief claimed or in issue is not more than $12,000; or
(c) The parties agree, in accordance with section 37 of the District Courts Act 1947, that a District Court shall have jurisdiction to determine the proceedings.

18 See Inland Revenue Dept Act 1974, ss 13-15, Statistics Act 1975, s 21.

19 See MacArthur para 79.

20 The provisions of s 32 regarding changes of name have been amended to take account of the changes to s 31.

Political Judges

[Franklin D Roosevelt] asked why lawyers were so conservative, why they turned out to be stodgy Judges. He mentioned no names, but he obviously had been disappointed at some of his own judicial appointees. I told him that there was nothing in the Constitution requiring him to appoint a lawyer to the Supreme Court.

"What?" he exclaimed. "Are you serious?"

I answered that I was.

He lit a cigarette, leaned back and after a moment's silence said, "Let's find a good layman". He became expansive and enthusiastic and held forth at length, going over various names.

"You'll have to pick a member of the Senate," I said. "The Senate will never reject a layman as a nominee who is one of their own."

His face lit up and he said excitedly, "The next Justice will be Bob La Follette". There was no vacancy then, and none occurred before FDR died. But a plan had been laid to shake the pillars of tradition and made the Establishment squirm by putting an outstanding, liberal layman on the Court.

– The Court Years
The Autobiography of
William O Douglas

Timesharing

By D A Wishart, an Auckland practitioner.

Last November the International Bar Association ran a 3-day seminar in London entitled "Leisure Timesharing". The objects of the seminar were to bring together the practical advice and experience of all those involved in the area of timesharing, to discuss current legal developments and to facilitate the exchange of ideas. With these objects in view, speakers and panelists included lawyers from Britain, France, Portugal, Spain and USA, representatives of two major international timeshare exchange programmes, and timeshare developers and marketers. In addition, lawyers taking part in the seminar came from those countries and from Australia, Barbados, Bermuda, Ireland, Kenya, New Zealand, Norway, Singapore, South Africa, Sweden and Switzerland. The New Zealand representative was Mr D A Wishart the author of this article, who has been involved in development of the fee ownership type of timesharing in several resorts in New Zealand.

Timesharing is the concept of sharing with others the use of real or personal property during agreed periods of time – usually recurring in successive years during a predetermined period, or in perpetuity.

In its application to holiday resorts, it appeared first in Switzerland 20 years ago in the launching of a property holding company, accompanied by the sale of "holiday certificates".

The attraction of the concept is that for a fraction of the cost of a second or holiday home, a timeshare purchaser will be able to acquire the rights to use a property only for the period that he or she chooses without tying-up very large amounts of capital. Additionally, the costs of maintenance, the payment of rates, and the refurbishment costs are similarly reduced.

1967 is generally recognised as the year of introduction of timeshare ownership as such – the division of the beneficial ownership of property according to time. The resort which introduced this concept was situated in France. 1968 saw the introduction of timesharing to USA with establishment of a resort in Hawaii, and during the 1970s it spread around the globe reaching New Zealand, in Queenstown, in 1979. By the end of 1982 the Tourism Advisory Group Limited of UK recorded in its "World Timeshare Statistics" a total of 1,179 Resorts incorporating 730,000 owners.

Resort timesharing is generally classified into two broad categories: The ownership type, involving the purchase of an ownership interest in real property; and the right-to-use type, involving the purchase of a right to use the living space for a specified number of years but excluding any ownership interest in the realty. Not unnaturally, title based ownership schemes reflect the diversity of real property laws throughout the world.

Great Britain

Under Scots law a lease cannot provide security of tenure unless the lessee has exclusive possession of the leased property (which does not happen during the weeks that do not apply to him in a timesharing situation) whilst in England, although the decision in *Smallwood v Sheppards* [1895] 2 QB 627 is relied upon to validate a timeshare lease, the decision in *Cottage Holiday Associates v Customs and Excise Commissioners* [1983] 1 WLR 861 held that the length of term can only properly be measured by adding together the periods during which the lessee is entitled to occupation, so that a lease for 80 years for annual periods of one week effectively creates a lease term of less than two years – and is not capable of registration under the law which requires a registered lease of registered land to be for a minimum term of 21 years.

Complications also arise in relation to freehold title in that English law limits to four the maximum number of joint owners of the legal estate and prohibits an undivided estate in land from existing in its own right, while Scots law raises problems of partition.

As a result of these various problems, timesharing is usually accomplished in Britain by utilising an unincorporated club structure with the land being held on behalf of the club members by a trustee (frequently a large British clearing bank), although in the case of two recent developments in Cornwall, unregistered leases were additionally granted to the purchasers.

An alternative method employed has involved the floating of a public limited company but this is not as popular because of the detailed documentation involved and the added complications of marketing, both from the point of view of the developer and that of the purchaser.

United States of America

In the United States a distinction is made between "fee ownership" and "right-to-use". Fee ownership is further divided into tenancy-in-common, interval ownership and partnership arrangements. Right-to-use usually takes the form of a vacation lease, licence, or club membership. Here also, one finds a further variable in the structure. Although the timeshare period normally is one week, the week may be either fixed or "floating". In other words, the timeshare period can be designated so that it is used at the same time each year, or it can be floated throughout the year or within a particular season and determined by reservation. This arrangement can be further modified by not only floating the time period, but also the actual unit, which means that the purchaser is not assured of occupying the same unit each time, and the units are assigned through advance reservations.

Tenancy-in-common (or Time Span Ownership) combines a conveyance of a tenancy-in-common interest with restrictive covenants. The restrictive covenants establish the rights and duties of each tenant-in-common and are usually incorporated in a declaration of restrictive covenants or declaration of condominium which is able to be registered in the office of the Clerk and Recorder of the local County, so that the covenants run with the land. In form, the declaration appears to encompass those matters provided for in the NZ Unit Titles Act (including Body Corporate Rules) with further provisions to constitute the timeshare system for use of the individual units – including provision for both fixed time and unit, and floating time and unit. In some respects it is similar to the conceptual approach in New Zealand to the formation of a building scheme, but it is used in a title system more closely resembling the NZ deeds system, and the declaration contains positive covenants which would not run with the land under NZ law. This, however, is the preferred system in most states in the US.

The other type of fee ownership is known as interval ownership. Rather than involving an absolute fee simple interest as in the tenancy-in-common approach, there is a revolving or recurring estate for years with the remaining interest to be converted to a tenancy-in-common at a designated future date. Careful legal documentation is needed to avoid the merger of the lesser interval ownership estate into the greater estate of remainder in tenancy-in-common, and this type of fee ownership is now the less popular.

Right-to-use timesharing takes three major forms: vacation lease, vacation licence, and club membership. The developer retains title to the property which reverts to him absolutely upon expiry of the period fixed in the timesharing documents. This period is typically less than the useful life of the building(s) – in the range of 10 to 20 years.

The forms of the right-to-use documentation will be fairly self-evident from the names used to describe them, with the club membership having many similarities to the more popular English timesharing system, except for the underlying lease from the developer employed in the US as opposed to the underlying freehold ownership by the club which is used in Britain.

The most interesting commentary from the USA was the favourable reference to an innovation referred to as a "timeshared co-operative" which is claimed to be a hybrid that has many of the advantages and few of the disadvantages of both right-to-use and fee timesharing.

Under the co-operative structure each purchaser owns a portion of all of the premises through the purchase of shares of stock in a corporation which owns the project. The specific interests of the purchasers are established by the use of proprietory leases which create the interval calendar establishing the shareholder's occupancy right, legislate for maintenance charges, delineate common areas, establish services provided to owners, and in general fix the rights and obligation of the interval co-op owner.

This brief description of the timeshared co-operative appeared to have much in common with the New Zealand fee ownership type mentioned below.

Consumer protection in connection with timesharing is a matter of major concern in the US where this concept has been far more extensively developed than in most other countries – UK regulatory controls being confined to townplanning laws and legislation similar to the NZ Securities Act provisions. Substantive purchaser protection under US state laws can include the following:

Escrow arrangements: Title to the property may be held in escrow until title to the timeshare is delivered to the purchaser and moneys may have to be escrowed during a rescission period or in order to pay for completion of the promised facilities, or to repay or partially repay the mortgage on the property.

Bonding requirements: Some states require the posting of bonds to assure completion of facilities and/or to provide refunds to buyers if facilities are not completed. (By contrast, similar provisions in France can result in imprisonment of the developer if the bond has not been established before sales commence!)

Management Arrangements: Some state laws require specific management and owners' association standards.

These concerns become more manifest in the case of a right-to-use project because of the possibility of the developer going bankrupt even after the project has been built. For this reason several state laws require non-disturbance agreements to protect purchasers from a mortgagee's sale and from lease forfeiture by other third parties, whilst some have provided that payment of part of the sale moneys must be spread over the term of the lease/licence.

France

In France the title position differs again. French law recognises a strata title, but limits any agreement among joint owners of a property to a maximum term of five years. In consequence of this difficulty, French developers use a type of company ownership with the number of shares held determining the proportion of each shareholder's liability for the annual maintenance cost of the resort, and the Articles of the company determine each shareholder's use rights. Additionally, draft legislation has been prepared to give timesharing some definite legal status and to protect purchasers' interests, and it is expected that this will shortly be enacted.

Spain and Portugal

Unfortunately notes were not distributed in respect of the addresses by the lawyers from Spain and Portugal. The Spanish system appears

to provide for a tenancy-in-common in stated shares similar to that utilised in the Torrens system, but the Civil Code contains a number of rules relating to common property including an automatic right of partition unless waived. Timesharers acquire a freehold type title in Spain, whilst in Portugal a club type of scheme is utilised – at least by the British developers who operate there.

New Zealand

Timesharing first appeared in New Zealand in 1979 when vacation licences were first sold by the Tourist Hotel Corporation in respect of its Wairakei Villas, and by Turner Heights Townhouses in respect of that company's development at Queenstown.

THC was ahead of its time in the market having first evolved the scheme in 1976 when the very concept of timesharing was relatively undeveloped (it did not reach Australia until 1978). As a result, the vacation licence in effect capitalised the future annual maintenance charges of the 40-year period of the licence, placing the price structure at a level that the market found difficult to accept in respect of this novel concept. A satisfactory sales level was difficult to achieve despite the variety of avenues explored, and the Corporation stopped later in 1979, and has since offered to purchase from licensees wishing to dispose of their interests.

Starting quite independently a few years later, but arriving in the market in 1979 also, David Bradford of Turner Heights Townhouses structured his vacation licence in the now generally accepted form whereby annual maintenance charges are recovered from the timeshare owners on the basis of actual cost plus a management fee. Bradford's research suggested that a vacation licence for a limited period would be more suited to the New Zealand market. He chose a period of ten years as being commensurate with the holiday life style of New Zealanders and representing a period during which he could take a personal interest in the development.

Both these developments commenced before floating time became a marketable concept in timesharing, but each operates an exchange system within its own resort and each are members of one of the international exchange organisations, Resort Condominiums International.

Two years later, towards the close of 1981, Fairway Lodge at Mount Maunganui became the first timeshared resort to offer fee ownership. The Fairway Lodge title scheme, which has since been followed at Taupo Ika Nui and at Lakeside Villas, also at Taupo, is based upon an amalgam of the Unit Titles Act and the "cross-lease" which formed the basis of the first flats developments in New Zealand, and which is still used extensively for that purpose alongside the more sophisticated, but more complicated, provisions of the strata title legislation.

Under this system, strata estate titles are obtained for each unit in the resort in conjunction with the adoption of specially drawn body corporate rules under the Unit Titles Act. These rules cover in detail the obligations of the unit owners and provide in particular for the management and administration of units which are owned by timesharing owners, thereby ensuring that these provisions will run with the land to bind successive owners. Against the title for each unit 51 cross-leases are registered. The form utilised is similar to that used for cross-lease flats save that instead of relating to different flats, the lease relates to different weeks in the same year, and each set of leases applies to one unit only.

In both the rules and the leases provision is made for a management committee for each unit and a management committee for the resort, so that owners can be involved in management and control of the resort to whatever extent they wish – but in order to avoid a complete breakdown of the system through lack of interest, further provision is made for delegation to the Resort Manager in the absence of express owner instruction.

All three resorts have retained the same management company which is independent of the different groups of developers who have promoted these three resorts, and it is anticipated that this multiplicity of involvement will strengthen the management function and assist and facilitate the making of exchanges between owners in each resort. In addition each is a member of one or other of the two major international exchange programmes, Resort Condominiums International and Interval International.

Development and Marketing

The address by a representative of Barratt Multi-ownership which has been involved in several resorts having a total of 160 completed units and over 4,000 timeshare owners, and the visual inspection provided by Gulf Leisure, also a substantial timeshare developer, of one of its developments in Kent, were highlights of the practical side of timesharing.

In each of the UK resorts with which these groups are associated, the development has more closely resembled that of a country club. Most of the resorts comprise several hundred acres including golf courses and extensive sports facilities, and in order to spread the substantial costs of operating these facilities, a public membership to the sporting facilities has frequently been incorporated. In addition, by utilising a club membership scheme rather than fee ownership, it has been possible for management to retain part of the yearly inventory of weeks and use these to promote public involvement in special-interest package-holiday type seminars, to use the facilities in off-peak periods. The profits from this source also assist to lower the annual maintenance charges to timeshare owners.

Both speakers echoed the THC experience in New Zealand, in commenting on the particular requirements of marketing in this field. Real estate agents, travel agents, and stockbrokers, are specialists in their own fields, but none was found by these developers to be successful in selling timeshare interests. Sales programmes world-wide are at pains to play down any suggestion that this type of purchase can be regarded as either a capital or income investment – the substantial marketing costs (usually 25 percent to 40 percent) would swallow most of the apparent profit on any re-sale. Emphasis is placed rather on the inflation-proofing aspect of a future holiday purchase, the exchange facility (both overseas and within the country of the purchaser's residence), and the entertainment/sports facilities available on site or adjacent to the resort.

Sales success in Britain, and with British residents buying into British-owned resorts in the sun belt of Europe, appears to have flowed largely from extensive "mail drops",

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Rectification of Wills: A case for reform

By Julie Maxton, Lecturer in Law at the University of Canterbury

The essential problem in interpreting the will of a testator or testatrix is that they are no longer available to give evidence of their intention — even if the evidence were admissible. In this article Julie Maxton looks at the question of rectification where there have been "mistakes", and more particularly at the discussion of rectification in the reports of the English Law Reform Committee and the Queensland Law Reform Commission. She considers critically the statutory enactments that have followed these reports.

For various reasons and in many ways, mistakes sometimes occur in the drafting and execution of wills. Once discovered, whatever their origin, the pressing question is: What can be done? Recently in England and Queensland legislation has been introduced enabling the equitable remedy of rectification to be used to provide relief. In New Zealand, however, the difficulties and perplexities of the common law rules remain. By examining the more common types of mistake, the powers of the Courts in respect of them, and, finally, the English and Australian provisions regarding rectification, it is hoped that a case will be made out for New Zealand legislation to be considered to free this area of succession law from its present complexities.

Common types of mistake in the law of wills

Before a document will be admitted to probate both the physical and mental elements of legal testamentary execution must be complied with. That is, the formalities required by s 9, *Wills Act* 1837 coupled with a knowledge and approval of the contents of the document in question. Demonstrating a *want* of knowledge and approval because of mistake often proves difficult because where a will appears properly executed in point of form then it will be presumed that the testator *did* know and approve its contents. Thus, a person challenging a duly executed will has a formidable task: to succeed he must establish that the testator's intention was not given effect to by the document propounded as his will. The inference being, in such circumstances, that the testator did not fully appreciate what he was executing due to some sort of mistake which has vitiated the requisite mental element.

An attempt at reconciling the cases to ascertain what types of mistake may amount to a want of knowledge and approval is likely to produce "intellectual gymnastics, if not acrobatics", *In re Morris (decd)* [1971] P 62 at p 75 (per Latey J). Without aspiring to such athletic heights it is, however, possible to instance the more common types of mistake in this context.

First, where the testator makes a clerical slip when drafting his own will. If the clerical slip takes the form of *including* words in the will by mistake then they will be omitted from probate. The Courts' attitude is that since the testator is not alert even to the existence of the words then he should not be bound by them. Indeed, if he *had* appreciated their presence he would have taken steps to exclude them. An illustration of this category of mistake may be found in *In re Phelan* [1972] Fam 33.

In that case the testator executed a home-made will on 10 June 1968. That will contained a legacy and a gift of residue. On 29 July 1968 he executed three further wills which dealt solely with different blocks of specific assets. These documents were not inconsistent but the problem was that each of the July wills was made on a printed will form which contained a clause purporting to revoke all previous wills made by the testator. On an application by the sole surviving executor for a grant of probate of all the wills it was held that all four wills could be admitted to probate. Although the testator had signed printed will forms containing revocation clauses he had not adverted to those clauses: it was as if they

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leaflet hand-outs, on site visit concessions (free meals/free green fees), and advertising in magazines which are read by groups that have been identified as purchasers by market profile research. Both overseas and in New Zealand, satisfied customers frequently prove to be some of the developer's best salespersons, either buying more time themselves or referring others who become purchasers in turn.

The Future

Only brief mention was made of future developments in timesharing. The concept lends itself to a variety of property interests and has already appeared in New Zealand in the boating world; but the acme of ingenuity must surely have been reached by the American entrepreneur who puzzled his attorney when he took him to inspect his latest timeshare development – a series of small shed-like buildings each complete with bar, TV, and comfortable lounge chair: "Haven't you ever been sent to the dog box by your wife?" he said, "There's a huge group of husbands out there, that just need something like this!" □

had slipped in by clerical error. Stirling J at p 35:

> . . . although a testator who has executed a will, which prima facie he has read, if he is of competent mind must be taken to know and approve what he executes, and that would include, of course, a revocation clause, there is no presumption of law; it is merely a grave and weighty circumstance to consider, and if the obvious facts militate against such an intention as expressed in the document the Court can act upon the real intention as found by the Court. It can do so in this case (and there is authority for it) by omitting certain words. The Court cannot, of course, remake a will for a testator but it can omit words which have come in by inadvertance or by misunderstanding if their omission gives effect to the true intentions of the testator as found by the Court.

A second type of mistake occurs when a clerical slip is made by a draftsman to whom the testator has delegated the task of drafting his will. In such cases the question for the Court is: Had the testator knowledge and approval of the draftsman's work, including his clerical error(s), before signing?

What amounts to knowledge and approval in this sphere is problematic.

If a draftsman makes a clerical error in a will, and that will is *not* read by or read over to the testator before execution, then the testator will not be deemed to have adopted the draftsman's mistake. See, eg *Morrell v Morrell* (1882) 7 PD 68; *In the Goods of Schott* [1901] P 190; *Re Smith (deceased)* [1956] NZLR 593, and *Re Whyte (deceased)* [1969] NZLR 519.

Where, however, a will containing a draftsman's clerical error *has* been read over to a testator prior to execution the law is rather more complicated, having undergone many changes since the mid-nineteenth century where the relevant principle was stated thus by Sir J P Wilde in *Guardhouse v Blackburn* (1886) LR 1 P & D 109 at p 116:

> . . . the fact that the will has been duly read over to a capable testator on the occasion of its execution, or that its contents have been brought to his notice in any other way, should, when coupled with his execution thereof, be held conclusive evidence that he approved as well as knew the contents thereof. . . .

The injustices wrought by this rule were attacked by the House of Lords in *Fulton v Andrew* (1875) LR 7 HL 448, (an appeal from a decision of Lord Penzance, formerly Sir J P Wilde). Lord Hatherley commented on the supposed existence of such a rigid rule at p 469:

> . . . by which, when you are once satisfied that a testator of a competent mind has had his will read over to him and has thereupon executed it, all further inquiry is shut out. No doubt those circumstances afford a very grave and strong presumption that the will has been duly and properly executed by the testator; still circumstances may exist which may require that something further shall be done in the matter than the mere establishment of the fact of the testator having been a person of sound mind and memory, and also having had read over to him that which had been prepared for him, and which he executed as his will. . . . One is strongly impressed with the consideration that, according to the natural habits and conduct of men in general, if a man signs any instrument, he being competent to understand that instrument, and having had it read to him, there is a strong presumption that it has been duly executed, and that very strong evidence is required in opposition to it in order to set aside any instrument so executed.

These dicta allowed for the possibility that a testator might *apparently* read his will over and execute it and *yet*, not have knowledge and approval of its contents. Such a situation arose in *Tartakover v Pipe* [1922] NZLR 853. There the testator's will was prepared in a hurry by his draftsman, and owing to a mistake on his part, or on the part of the typist, the will did not express correctly the testator's intentions as to the disposal of his estate. (The word "real" was included in error.) After the will had been typed the draftsman did not read it himself, and it was not read by anyone to the testator. Instead the draftsman handed it to the testator who "looked at it" and signed it. Was the testator to be presumed to have knowledge and approval of its contents? Sim J at p 856:

> In the present case the will was not read to the testator and Mr Dougall [the draftsman] does not say that the testator himself read it over. He looked at it, he said, and then signed it. I am satisfied that the testator's mind could not have been directed to that portion of the will in which the gift to his wife was limited to his real estate. If he had known that the gift was limited in this way he certainly would have objected to it, and would have refused to sign the will.

Thus, merely "looking over" a will prior to signing did not amount to a sufficient "reading over" such that knowledge and approval was established on the part of the testator. Or, if it did amount to a reading over it was of an insufficiently attentive nature to establish knowledge and approval.

More recently, in *Re Morris (deceased)* [1971] P 62 reading in the sense of "casting an eye" over the will before execution failed to cause the presumption of knowledge and approval to operate. The facts of that case were these: By clause 7 of her will a testatrix gave several pecuniary legacies including one to a resident employee, Winifred Hurdwell, which was contained in subclause (iv) of clause 7. Miss Hurdwell also benefited under clause 3 of the will. Later the testatrix wrote to her solicitor informing him that she wished to revoke the provisions relating to Miss Hurdwell (and substitute others) but that she wanted no other change in the will. The solicitor, therefore, drew up a codicil which included the words "I revoke clauses 3 and 7 of my said will". The codicil should have read "I revoke clauses 3 and 7 (iv)".

The testatrix executed the codicil after, as Latey J found, having "read it in the sense of casting her eye over it" but without really taking in its effect, at p 74:

> That the engrossment effected what in fact it effects she never knew — it never registered on her consciousness — it was never within her cognisance — to mention some of the phrases which have been used in this context. If she had known she would never have approved and never executed.

Therefore, approving *Fulton v Andrew*, Latey J held that the testatrix had no knowledge and approval of that part of the codicil and that although the Court had no power to rectify by adding words to the instrument it would do what it could by omission, *In re Morris*, at p 81:

> I cannot add the numeral (iv) after 7 but if 7 is excluded, clause 1 of the codicil would read as follows: "1. I revoke clauses 3 and of my said will.

To some extent, therefore, the testatrix's intentions were effected.

In this alteration to the probate copy of the will it may be ascertained that the jurisdiction to exclude words from probate is carried to a point well beyond its previous limits. In earlier cases, the words struck out were words which had got into the will by accident and which the testator never intended to be there. See the cases already discussed and *Re Boehm* [1891] P 247 and *Re Schott* [1901] P 190. In *Re Morris*, by way of contrast, the words ordered to be struck out were in the will with the full knowledge and approval of the testatrix: what happened was that their

meaning was modified by the accidental omission of other words.[1] Were rectification available to the English Courts at the time, resort need never have been had to such a questionable method of effecting a testatrix's intention. But, as G M Bates commented in 1976:[2]

> . . . the testator's intentions, where they can reasonably be deduced from evidence available, should be paramount; otherwise, the spirit of the Wills Act is itself subordinated to the formal requirements designed to put that purpose into effect. So let us hope that the equitable doctrine of rectification will soon by applied to wills and that the Wills Act itself will be subjected to much closer scrutiny in the near future.

A third common type of mistake takes this form: where a testator, drafting his own will, includes words which he *intends* to use but he is mistaken about their legal effect. In such circumstances, despite his mistake, he is deemed to have knowledge and approval of the words and they must, therefore, remain in the will. This principle was considered in *In the Estate of Beech* [1923] P 46, where Salter J stated at pp 53-54:

> A testator cannot give a conditional approval of the words which have been put into his intended will by himself, or by others for him. He cannot say: "I approve these words, if they shall be held to bear the meaning and have the effect which I desire, but if not I do not approve them". He must find, or employ others to find, apt words to express his meaning; and if, knowing the words intended to be used, he approves them and executes the will, then he knows and approves the contents of the will, and all the contents, even though such approval may be due to a mistaken belief of his own, or to honestly mistaken advice from others, as to their true meaning and legal effect.

It is submitted that here, again, some remedy is required to mitigate the rigours of such principles. For many would-be testators it is difficult to comprehend why a mistake in their understanding of a word must stand, while, perhaps, written evidence of their actual intentions exist. Any such written evidence ought to provide "convincing proof" to rectify a will thereby effecting the testator's intentions. Especially ought this to be so if those written intentions satisfy the rationale of s 9, Wills Act 1837 (that is, freedom from fraud, forgery and coercion) and perhaps even the formalities of that section. It seems a needlessly harsh law which denies relief in such circumstances.

The final category of mistake which will be examined is the following: where a draftsman deliberately chooses words which (he thinks) will effect the testator's instructions but, unfortunately, he is mistaken in his choice: the words do not, in fact, effect the testator's instructions.

Here, again, it is pertinent to ask: Had the testator knowledge and approval of the words before signing? If so he will be bound by them, despite the fact that he may be unaware that there is a discrepancy between his instructions and the effect of the will. In this category, as opposed to the clerical error situations, it is not the inclusion of the words themselves that the testator objects to but their legal effect. He is not saying "If I had known the words were there I would have excluded them" but, rather, "I knew the words were there, but if I had perceived their legal effect I would have excluded them". *Collins v Elstone* [1893] P 1, illustrates the point.

In that case a testatrix, who wished to revoke only one provision in an earlier will, was misinformed by her draftsman as to the effect of a revocation clause. The draftsman assured her that it would not revoke her earlier will and codicil entirely. (Unfortunately its effect was to do just that.) But, satisfied by his assurance the testatrix executed her will with the revocation clause in it. It was held that the testatrix must be taken to have known and approved of those words of revocation, and that they must be included in the probate of the last will.

Following *Morrell v Morrell* (1882) 7 P D 68, the President of the Probate Division in *Collins v Elstone* at p 4 approved of the view of Lord Hannen in that case:

> . . . if a testator employs another to convey his meaning in technical language, and that other person makes a mistake in doing it, the mistake is the same as if the testator had employed that technical language himself.

The President went on to question whether it might not be possible to extend the doctrine of fraud so as to include this mistake. He concluded, however, that there was no authority for it. He therefore regretted that he was:

> . . . compelled to come to a conclusion the effect of which I am conscious will be that the real intentions of the testatrix will not be carried out.

A lament of a similar nature was expressed by Templeman J in *In re Reynette-James* [1976] 1 WLR 161, over 80 years later. In that case, expressing his regret at defeating the testatrix's intentions because of a mistake in the will, he concluded at p 168 that:[3]

> The result is not satisfactory but will perhaps encourage a further study of the recommendations which have been made from time to time that rectification of a will should be allowed on the same terms as rectification of other instruments, with perhaps the added safeguard of written contemporaneous evidence supporting the claim to rectification. There is ample such evidence in the present case but it does not enable the will to be rectified.

Collins v Elstone was followed in New Zealand in *Re Walker (deceased)* [1973] 1 NZLR 449, where a testatrix was bound by her draftsman's use of the word "issue" although it was at variance with her intentions. Henry J at p 451:

> The law is, I think, clear that mistake as to the legal effect of the language used is no ground for either altering the will or for construing it so that a result desired by the testatrix is obtained.

Many other types of mistake exist. The few types discussed, however, adequately illustrate the problem. Given then, that errors do occur, what can be done about them? The Courts' remedial jurisdiction provides the answer.

The powers of the Courts to correct testators' mistakes

The Courts have powers to correct mistakes in testamentary documents on two distinct occasions. The first is when probate of the instrument is sought. The second is if the interpretation of the instrument is in question before a Court of construction.

A mistake may be corrected by a Court of probate if it can be shown that there is a want of knowledge and approval in respect of that part of the will. To this end the reception of extrinsic evidence is allowed.

Before a Court of construction, however, no such extrinsic evidence is, as a general rule, admissible. That Court is constrained once the will is established, to confine itself to the terms of the document itself.

The powers of the Court of probate in remedying mistakes are basically exclusionary. The Court may omit from probate words inserted in the testamentary instrument by mistake but it may not include words omitted by mistake, as that would subvert the policy of the Wills Act that a will must be in writing. A rigid adherence to this principle has defeated testators' intentions in many cases despite the existence of convincing proof of those

intentions. In *Harter v Harter*, (1873) LR 3 P & D 11, for example, a testator instructed his draftsman to include a clause in his will giving the residue of his estate equally to his sons when they attained 21 years. From those instructions a draft will was drawn up which disposed of the residue in these terms: "The trustees to stand possessed of all the residue and remainder of my *real* estate in trust to divide the same, etc".

The testator read over the will and executed it. Probate, however, was applied for with the word "real" omitted: it was contended that it had been inserted by mistake. By expunging that word the testators' intentions would be effected. Unfortunately the draftsman gave evidence that he had intended to write "real and personal estate" but that, through inadvertance, he had omitted the words "and personal".

Sir James Hannen dismissed the application stating that since the error was one of omission it was not open to the Court to supply the missing words.

The difficulties and injustices wrought by this principle have encouraged Judges to interpret mistakes as ones of insertion rather than omission in an attempt, wherever, possible, to effect remedial action in accordance with testators' intentions. This task is further complicated, however, by observations of the Court of Appeal in *Re Horrocks* [1939] P 198. In that case a draftsman mistakenly included in a will the words "charitable *or* benevolent" instead of "charitable *and* benevolent". The result, if unaltered, was to exclude from charitable status a gift which the testatrix had intended to be charitable. Probate was therefore sought with the word "or" omitted. (The word "and" could not be substituted, given the exclusionary nature of the Court's powers.)

The Court of Appeal refused to omit the word "or" because that would have the effect of qualifying the word charitable to exclude that part of the field of charity which was not benevolent. This the testatrix had not approved when she adopted the word "charitable" in her will. The Court, in consequence, concluded at p 218 that:

> It appears to us that so to alter a will as, under the guise of omission, to affect the sense of words deliberately chosen by the testator or his draftsman is equivalent to making a new will for the testator, and on principle we do not consider that this is permissible.

These observations have been roundly criticised.[4] Indeed, it is difficult to see how or why any litigation would be instigated if the best that could be hoped for is that the part of the will remaining is to have the same meaning as before. It is suggested, therefore, that when Lord Greene spoke of not affecting the "sense of words deliberately chosen by the testator or his draftsman" what he perceived was the adoption of a formula precluding the result of an omission being construed *totally* at variance with the testator's intentions. If, however, the omission has the effect of altering the will while keeping within the *general sense* of the testators' intentions then it ought to be permitted. Without such an interpretation Lord Greene's apparent agreement with earlier cases, eg, *Re Boehm* [1891] P 247 and *Re Schott* [1901] P 190, is inexplicable.

It may readily be discerned from the foregoing that the exclusionary powers of the Court of probate tend to be rather restrictive. The powers of the Court of construction suffer from a similar disability. Courts of construction may not exclude words from testamentary instruments, nor may they receive extrinsic evidence in support of a case for exclusion. But if it appears from the face of the will, looked at as a whole, that a mistake has been made then the Court of construction may not be helpless, *Tatham v Huxtable* (1950) 81 CLR 639 at p 651 per Kitto J:

> The only sense in which it is true to say that a Court of construction may correct mistakes in a will is that that Court may give effect to inferences obtained from the will as a whole with the assistance of evidence of surrounding circumstances [eg, of family and property] if ambiguity in the will justifies resort to such evidence . . . notwithstanding that to do so involves an alteration of the words used.

The complexity of the law in this area, the artificial distinctions of mistaken insertion or omission, the problems associated with *Re Horrocks* and the determined efforts made by the Judiciary to effect testators' intentions in cases such as *Re Morris* despite rigid rules, evidence a clear need for reform. It is unreasonable and undesirable to expect Judges constantly to devise ingenious methods to circumvent the present rules. Rather, it is time to re-evaluate, as England and Queensland have done.

Rectification: English and Australian views

Two main subjects were discussed in the 19th Report of the English Law Reform Committee: rectification and interpretation of wills.

As regards rectification, at para 10 of its report the Committee stated:

> It is not easy to perceive why the equitable doctrine of rectification does not apply to wills.

The difficulty, however, was: in exactly *what* circumstances ought rectification to be permitted? The Committee identified at paras 12-25, five different cases where a will might fail to give accurate effect to a testator's intention. They were: clerical error; misunderstanding of the testator's instructions; failure by the testator to appreciate the effects of the words used; uncertainty, and lacuna.

Of the first two situations the Committee recommended that it ought to be open to the Court to rectify a will where it could be established first, that the will failed to embody the testator's instructions and, secondly, what those instructions were. As regards standard of proof, the test laid down in the Court of Appeal in *Joscelyne v Nissen* [1970] 2 QB 86 at p 98, of "convincing proof" would have to be satisfied.

Of the third situation the Committee did not recommend that the remedy of rectification ought to be available. It took the view that such instances were more a matter of construction than rectification and concluded, at para 23, that:

> . . . we do not consider that rectification is an appropriate remedy where it cannot be shown that the words of the will are not those which the testator meant to use or intended to be used on his behalf. To go beyond that is to pass into the wider realm of the testator's purpose.

The final two cases, of uncertainty and lacuna, were clearly excluded from any proposed remedy of rectification because both, if they were to be remedied, effectively involved making the testator's will for him.

The Committee's opinion was that these recommendations would allow the doctrine of rectification to be applied to wills on the same footing as it applied to other instruments. Thus the exclusion of the third situation was justified at para 25:

> . . . there can be no rectification of a contract if it correctly embodies the words agreed upon by the parties even if there was some misapprehension as to the meaning or effect of those words.

Likewise, explaining the exclusion of the fourth and fifth situations from their recommendations, there could be no rectification . . . where the true intention was unascertainable or non-existent.

The Committee further recommended, at paras 30-31, that any relevant evidence, including evidence relating to the testator's instructions to his solicitor for the

preparation of his will, should be admissible and that reading the will over to the testator was one of the factors to which the Court would have to pay attention, but that it should have no conclusive effect. Finally, it was recommended at paragraph 32 that no action for rectification should be brought after six months from the date on which representation was first granted, except with the leave of the Court.

After a lengthy period of inactivity (the report was submitted in May 1973) some of the Committee's recommendations have been enacted in ss 20-22, *Administration of Justice Act 1982.*

Section 20 provides:

> (1) If a Court is satisfied that a will is so expressed that it fails to carry out the testator's intentions, in consequence –
>
> (a) of a clerical error; or
>
> (b) of a failure to understand his instructions, it may order that the will shall be rectified so as to carry out his intentions.

By subs (2) an application for an order of rectification shall not be made, except with the permission of the Court, after six months from the date on which representation was first taken out. Subsection (3) protects the personal representatives from liability for having distributed without anticipating that the Court may allow an application for rectification after six months from the date of representation elapsed. Subsection (4) determines when representation was first taken out.

This provision is welcome. It allows rectification in the first two of the five situations discussed by the Committee thereby ensuring that the Wills Act formalities retain their relevance in preventing fraud, forgery, etc, while not permitting them to work injustice on a testator whose real intentions are ascertainable despite a mistake on the face of the document.

The third situation, examined by the Committee (failure to appreciate the effect of the words used) although excluded from the ambit of rectification, is nevertheless accorded a special place in the Act. The Committee considered at para 22, that the "typical case" covered by this category was "the unintended life interest" created by a holograph will leaving "all my property to my wife and, after her death, to my son John". It may be demonstrable that what the testator really meant was that his widow should take "all absolutely and that John should take anything left when she died". By s 22 of the Act a presumption is established as to the effect of gifts to spouses:

> 22. Except where a contrary intention is shown it shall be presumed that if a testator devises or bequeaths property to his spouse in terms which in themselves would give an absolute interest to the spouse, but by the same instrument purports to give his issue an interest in the same property, the gift to the spouse is absolute notwithstanding the purported gift to the issue.

Rectification is not available in the fourth and fifth categories (uncertainty and lacuna) in line with the Committee's recommendations.

These provisions ought to relieve the Courts from the mass of fine distinctions, tortuous reasoning and limited powers which has been their lot to date. Effecting testators' intentions is the aspiration of paramount importance. The availability of the remedy of rectification will go some way to attaining this end.

The second major topic the Committee discussed was the interpretation of wills. This caused some difficulty, at para 34:

> It is easy enough to observe, at least in theory, the defects of the present law. Apart from being unclear, it is open to charges of inconsistency and anomaly. It is, however, we think, virtually impossible to produce rules of law which will result in every case in the real, as distinct from the expressed, wishes of the testator being carried out.

The Committee based its recommendations at para 35, on the understanding that two propositions were agreed upon: namely, first, that the requirement of the law that a will must be in writing ought to be maintained, subject to the existing exceptions. Secondly, that as far as is consistent with the maintenance of the rquirement of writing, the function of the Court in interpreting a will is to search for the true meaning which the testator intended his words to bear.

The Committee recommended, at paras 41-45 that extrinsic evidence ought to be generally admitted, and in two circumstances in particular. First, to establish the special meaning or significance which the testator was accustomed to attach to any word, name or expression used in the will. They regarded this proposal as being an extension of the "dictionary principle", and commented at para 41:

> The ultimate purpose of construing a will is acknowledged to be to give effect to the wishes of the testator. Having first rectified the will so as to ensure that the language is that which the testator intended to use, there seems no reason not to take the further step of discovering, by all means available, what those words conveyed to him.

Secondly, the Committee recommended that extrinsic evidence be admissible to establish as well as resolve any equivocation in a will, notwithstanding that the ambiguity is not apparent in the face of the will.

Section 21 adopts these recommendations by providing:

> (1) This section applies to a will –
>
> (a) in so far as any part of it is meaningless;
>
> (b) in so far as the language used in any part of it is ambiguous on the face of it;
>
> (c) in so far as evidence, other than evidence of the testator's intention, shows that the language used in any part of it is ambiguous in the light of surrounding circumstances.
>
> (2) In so far as this section applies to a will extrinsic evidence including evidence of the testator's intention, may be admitted to assist in its interpretation.

In Queensland s 31 of the Succession Act 1981 was passed as a result of recommendations contained in the *Queensland Law Reform Commission Report No 22* (1978). Section 31 provides:

> Power of Court to rectify wills. (1) As from the commencement of this Act the Court shall have the same jurisdiction to insert in the probate copy of a will material which was accidentally or inadvertently omitted from the will when it was made as it has hitherto exercised to omit from the probate copy of a will material which was accidentally or inadvertently inserted in the will when it was made. (2) Unless the Court otherwise directs, no application shall be heard by the Court to have inserted in or admitted from the probate copy of a will material which was accidentally or inadvertently omitted from or inserted in the will when it was made unless proceedings for such application are instituted before or within six months after the date of the grant in Queensland.

This section does not purport to go nearly as far as the English provision. A certain apprehensiveness was expressed by the Queensland Commission in respect of the Report of their English counterparts. Commenting that, although in favour of the English recommendations "we are hesitant to embark on what would be completely uncharted waters",[5] the Queenslanders seemed to place greater

Correspondence

Dear Sir,

Mr Baragwanath's intriguing reference to "Periclean education" ([1984] NZLJ 54) invokes the memory of the ninety-year period of Athenian brilliance in the 5th Century BC. Later generations have described it by reference to Pericles, the leading citizen of Athens in the period.

The concept of a Periclean education, as I understand the term, is certainly exciting, but probably not attainable in our own society. The social milieu which sustained Periclean education was a small political unit which was economically viable, where political life was conducted in a spirit of fervent egalitarianism.

In Athens, admittedly, the citizen body included only free-born adult males. Yet all important offices of the city were open to each citizen upon annual election. All important decisions were taken by the Popular Assembly. The only discrimination was that of popularity.

By comparison, our own society is too vast and diffuse. Paradoxically, authority is more restricted. The small body of Parliamentarians and Judges exercises the jurisdiction which the Athenian citizen body exercised en masse.

Our own age views education as primarily an individual exercise, achieved through a graded system of instruction. Periclean education was not a formal structure. It was a civic experience which involved the citizen in all civil and military duties of the city. It was not really concerned with acquisition of knowledge. Rather, it aimed to foster "arete", or "manliness": a moral quality, and a quite different ambition from our own system of secular education.

For an Athenian, education was involvement in the whole business of the community of citizens. An Athenian acted as a citizen when he was working in his craft (perhaps even that of a plumber), campaigning as a soldier, serving in the city's religious cult, or attending at dramatic performances: and most especially, when he voted in the Popular Assembly. The totality of his citizenship comprised his education.

In our century, the Anarchists during their brief period of scattered ascendancy in the Spanish Civil War could be best compared to the Athenians of the 5th Century. For the rest of us, a Periclean education belongs to a Golden Age beyond the reach of mortals.

G W Thwaite

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weight on ensuring that the Wills Act formalities were not subverted than on effecting testators' intentions wherever possible. That there was a pressing problem in this area of the law of wills the Commission acknowledged at pp 19-20: "the need for reform is well illustrated by the recent case of *Re Morris*". The Commission described the Court of Probate's powers of omission as an unjustifiable anomaly, continuing:

> It is, therefore, proposed to remove this anomaly by enabling the Court to exercise the same jurisdiction with respect to the insertion of material accidentally or inadvertently omitted from a will as it has at present to omit material which has been accidentally or inadvertently inserted in a will.

The problem with this proposal, and its subsequent enactment in s 31, is that it limits the remedy of rectification to the types of mistake solely concerned with the omission or insertion of words. But other categories of mistake exist and will persist. The English provisions recognise this in s 20(1)(b). The Queensland provision appears to over emphasise the Wills Act formalities and therefore denies the much needed latitude to effect testators' "real" intentions. This stance, it is submitted, reflects too much the strict view of past eras which eventually contributed almost entirely to the present problems. As the English experience demonstrates, it is possible to accord the s 9 formalities due weight and yet permit the availability of rectification to override them in certain circumstances. By this means in some cases the formalities will be prevented from operating to thwart the testator's intentions and the law will be seen to be receptive to the attitudes of the changing times.

However, although the English provisions provide relief in more circumstances than their Queensland counterparts, it is hoped that if and when reforms are enacted here the New Zealand provisions will be more extensive than both of those discussed. The English power to rectify only where there is a clerical error or a failure to understand instructions seems unnecessarily restrictive. For example, it precludes rectification where a draftsman has understood his instructions but deliberately omitted an intended bequest or legacy. Such a case would not fall within s 20 therefore a Court would only be able to do what it could by omission: a singularly hollow remedy when it is the *insertion* of words which is required to effect the testator's intentions. This criticism could have been avoided had the English Act allowed rectification wherever it could clearly be shown not only that the will did not contain the wording intended by the testator but also what the substance of that wording was.

To extend the remedy to provide relief where the testator or his draftsman has deliberately chosen particular words under a misapprehension as to their legal effect would be an innovative move, and one which the English and Queensland legislatures have not seen fit to undertake. However, given that mistakes commonly occur in this way, it does seem rather inequitable if convincing proof exists of a testator's real intention to ignore it in favour of words deliberately chosen under a mistaken impression. In cases where there is no suggestion of fraud, forgery, coercion, etc, it is surely taking the Wills Act formalities too far to withhold a remedy. Once the rationale of the Wills Act has been satisfied (ie, the will is shown to be freely made, etc) then there seems good reason to effect as far as possible the testator's real intentions rather than being bound to construe his expressed intentions as earlier lawyers and Judges have had to do.

Thus, from the shortcomings of the English and Queensland experiences reforms of this aspect of New Zealand succession law ought to be far-sighted and extensive. Effecting testator's intentions must be the prime objective – even if this necessitates, in some cases, overriding the s 9 formalities. Those formalities (altered in England by the Administration of Justice Act 1982) do go some way to preventing fraud, forgery, etc, but if the will is free from such unwelcome influences then the formalities have served their purpose: they ought not then to provide an insuperable obstacle in effecting testators' intentions in cases of mistake. Recognition of this and the other difficulties discussed ought to ensure that New Zealand legislative reform will not be slow in coming. □

1 For a criticism of this case see Ryder 40 *Conveyancer* 312.
2 *Another Case for Intention* (1976) 126 NLJ 1083 at p 1085.
3 And see R D Mackay "*Discovering a Testator's Intention*" 127 NLJ 1089.
4 At p 218, (Lord Greene). See, eg, Lee "*Correcting Testators' Mistakes: The Probate Jurisdiction*" (1969) 33 *Conveyancer* 322.
5 Queensland Law Reform Commission Report No 22 (1978) at p 19.

Books

Hamlyn Revisited: The British Legal System Today
The Hamlyn Lectures (35 Series)

By Lord Hailsham of St Marylebone, London, Stevens & Sons, 1983

Reviewed by G P Barton, Barrister of Wellington

Described variously as "quite a character", "autocratic rather than otherwise", and "very intellectual" Emma Warburton Hamlyn has proved to be a testatrix extraordinary. She was born in Devon almost 125 years ago. At the time of her birth her father described himself as a law clerk, but 16 years later was admitted a solicitor and practised in Devon for another 30 years or more. Miss Hamlyn, who never married, is said to have studied law, though with what degree of industry and success is not recorded. She travelled widely. She was well versed in literature, music, and art; and was a frequent visitor to the Continent and the Mediterranean. She became particularly interested in comparative jurisprudence and in the relationship between the law of a country and the culture of its people. As a result of her experiences and reflections on life and society she came to hold great admiration for the law and institutions of England. Her strength of character was shown when she came to make her will in 1939 by the fact that she insisted that her own draft of the gift of residue should be adopted without amendment. But do-it-yourself testatrixes are no better than their male counterparts. Fortunately, the gift of residue constituted a charitable trust, and it was possible for the Court to approve a scheme for the administration of the charitable trusts in a slightly different form from Miss Hamlyn's draft.

The main purpose of the trust was the furtherance among what Miss Hamlyn called "the common people" of her country of the knowledge of the comparative jurisprudence and the ethnology of the chief European countries including the United Kingdom to the intent that the common people of the United Kingdom should realise the privileges which in law and custom they enjoy in comparison with other European peoples and realising and appreciating such privileges may recognise the responsibilities and obligations attaching to them. The trustees decided that the most effective means of achieving the purpose on which Miss Hamlyn had placed such a high value was to arrange for the delivery of a series of lectures, usually in one of the Inns of Court in London, which are published and given wide circulation among lawyers and others. The series began in 1949 with the famous lectures by Lord Denning on "Freedom under the Law". The latest were delivered by the present Lord Chancellor of Great Britain, Lord Hailsham of St Marylebone, in May 1983 at Lincoln's Inn.

As their title indicates, the lectures take as their theme the comparison between the British legal system in the dark days of the Second World War, when Miss Hamlyn died, and the system as Lord Hailsham saw it when he wrote. Judges often speak about putting themselves in the testator's armchair or, less frequently, in his shoes. Lord Hailsham does something the same, spinning a web of imagination by attributing to Miss Hamlyn knowledge of the contemporary scene in 1983. He then submits her to a succession of Tofflerlike shocks.

The first shock would be caused by the change in the very idea of the "common people" of Great Britain. Miss Hamlyn, he suggests, may have assumed a greater degree of homogeneity in the population than in fact was the case, but the Lord Chancellor propounds the argument that in a complicated modern state, homogeneity is neither possible nor desirable. However Lord Hailsham does not satisfactorily explore the degree to which there should be some shared ideals and objectives that go to make up a nation whose "common people" can willingly look to the law as their standard of freedom and security.

In discussing the second shock which Miss Hamlyn would have experienced in viewing the world in 1983, Lord Hailsham refers to the changes that have taken place in the international political scene, particularly the decline in the importance of Britain and, as one of the causes of that decline, the emergence on a global scale of "east" and "west". This lecture is somewhat disappointing to the lawyer. As every reader of Montesquieu will recall, the Lord Chancellor is the marvellous refutation of the classical doctrine of separation of powers. Here Lord Hailsham seems to be speaking rather as a member of the executive than as the head of the judiciary. Lord Hailsham confesses to being haunted by the spectre of a Third World War, but appears to see no inconsistency in devoting a good deal of criticism to the peace movement, which in his opinion has misjudged the nature of the arms race, seeing it as a cause rather than a consequence of political tension. Lord Hailsham goes further. The peace movement might even be dangerous because it can disturb the delicate balance between the opposing forces and bring about resulting tension and war. The moral is, I suppose, prepare in silence to die!

Like many British politicians and constitutional lawyers, Lord Hailsham is preoccupied with the function of the House of Lords in the body politic. The upper house, in his view, performs a useful function by mitigating the shortcomings of the

elected chamber. And yet Lord Hailsham would prefer to see the House of Lords itself made up of elected members. But, again like many politicians, he reserves his strong criticisms for too-active pressure groups, those stirrers who reject the moral responsibility of every group and individual not to pursue even lawful objectives too far: take note, Barons of Runnymede, Thomas More, John Hampden, Oliver Cromwell, Tolpuddle Martyrs, Suffragettes – and other protestors too numerous to mention.

One of the elements of received wisdom about the British legal system at least up until the time when Miss Hamlyn's father was working as a law clerk was the marvellous virtue of the common jury. After-dinner speakers would sing its praise – the "palladium of British justice" they called it. All that has changed now. The current fashion is to emphasise the inadequacies of the jury system and to explain away its traditional advantages as in the nature of a concession to human frailty. But Lord Hailsham's great admiration is reserved for Judges, even those who indulge in "extending" the law. But a Judge should, he thinks, like a cobbler, stick to his last. Echoing a theme to which Lord Devlin gave eloquent expression in his Chorley Lecture on "The Judge as Lawmaker", Lord Hailsham considers that a Judge is usually wise "to observe the fiction that he is only interpreting and systematising existing law when he is fully aware" that by his decision, he cannot avoid breaking new ground. Systematisation is a notion that is congenial to the orderly legal mind. As Professor Rakoff has written, even "ordinary contract law represents an attempt to systematise a segment of social inter-action": (1983) *Harvard Law Review* 1174, 1283.

Lord Hailsham's discussion of Miss Hamlyn's fifth shock, depends on an accceptance of the thesis that the importance of contract is declining while the concept of status is becoming more important. There is much to be said for his view that contract has lost its pristine sanctity. Lord Hailsham could perhaps have referred to the New Zealand scene for more striking examples of the trend than he would find in Miss Hamlyn's own country. But the movement, he believes, is no bad thing, so long as the responsibilities of status are recognised. Even the taxpayer, whose sole duty is now seen as ensuring that he orders his affairs to provide for maximum liability to tax, is said to have responsibilities. Taxpayers' responsibility, so Lord Hailsham urges, is to assert themselves against overspending by governments for whatever good reason. It is not clear how the poor taxpayer is to engage in this assertiveness. The only weapon available to him at the moment is a pencil, usually blunt, in the privacy of the polling booth. If he is minded to embark upon litigation he will find all sorts of obstacles strewn in his path, although there are now some signs of relaxation in the rules of standing: see *Inland Revenue Commissioners v National Federation of Self Employed and Small Businesses Ltd* [1982] AC 617.

In the final lecture Lord Hailsham deals with the beloved hendiadys – "law and order". One of the great shocks to the reincarnated Miss Hamlyn would have been the amazing increase in the activities that give rise to criminal prosecutions, the actual increase in crime, and the development of criminal legal aid. Lord Hailsham's diagnosis is that the worldwide increase in violence flows from a widespread weakening in the respect for moral values and for political and social authority, without which ordered society is impossible. Many Judges, and Lord Hailsham is one of them, seem to regard criminal legal aid as a necessary evil, excellent in theory but disastrous in practice, because he describes it as "cascading out of control". Coupled with the problems caused by legal aid is the fact that in Great Britain contested trials on indictment are now taking approximately two hours each longer to dispose of than in 1973. Lord Hailsham can find no adequate justification for that trend, but the implied suggestion is that somehow or other it is linked with the operation of criminal legal aid. One of the problems about the comparative process is that all too often its basic assumption is that one of the matters being compared is the desirable norm. May it not be, on a proper analysis, that the time taken for the disposal of contested trials on indictment in 1983 is, on average, about right, and that ten years ago those who were involved in the criminal process, for one reason or another, were not devoting an appropriate amount of time to the preparation and trial of criminal cases?

At the end of the lectures it is not clear whether Miss Hamlyn would have drafted her will in quite the same form if she had prepared it in 1983. But on balance the Lord Chancellor looks at the British legal system of which he is the epitome, and sees that it is good. "I do not find anything," he says "in the essential structure of our institutions or our law, or our sense of continuity with our past, which I should wish to alter." How many of the "common people" of Britain would share that view? □

Family Law and Social Policy, (2 ed)

By John Eekelaar, Fellow of Pembroke College, Oxford. Weidenfeld and Nicolson, London 1984, xviii & 263 pp £8.95 (in UK)

Reviewed by P R H Webb of Auckland University

This book is one of the many "Law in Context" series. Its first edition appeared in 1978. The learned author writes in his Preface that his purpose in writing the second edition was very different from what he was seeking to do in his first. His first edition was a response to what was then perceived to be a shortcoming in the way much family law was then taught. "Courses concentrated," he explains, "on the legal rules and paid little attention to their social setting, still less to what empirical knowledge then existed as

to how they actually worked". Thus, he states, there resulted a book which organised its material around the main areas taught as family law.

In this second edition, the author has abandoned the approach of providing "a background illumination to the standard family law course". The major reason given is that, the "central" texts have reacted to the "law in context" movement and provide much fuller reference to the data on such issues. He has seized his chance and used his second edition "as a vehicle to rethink many of the basic principles on which family law opertes", but (wisely) does not seek to treat all legal questions. It is "an attempt to put forward a coherent and principled theory which might underlie what I consider to be some of the most important problems with respect to the state's role in relation to family living".

There are four parts to the work: Part I, entitled "The Family, Law and Social Change"; Part II, called "Law and Adjustment"; Part III called "Law and Protection"; and Part IV, entitled "Law and Support". The main theme may be said to be that more, and better, attention should be paid to children, children's rights and child care.

Essentially the book is designed for consumption in England and Scotland despite the creditably generous citation of legal sources and other essential data from Australia, Canada, New Zealand, the United States of America and, of course, the United Kingdom itself. Even so, it cannot fail to impress itself very favourably upon the antipodean reader. It will provide excellent food for thought for the New Zealand (and, one would hope, Australian) law reformer, the politician with genuine interest in family law and in improving the lot of disadvantaged children, the policy makers in the Departments of Justice and Social Welfare, and, indeed anyone who is desirous of widening his family law horizons. It is, needless to say, compulsory reading for teachers of family law.

It is, however, suggested that the antipodean student should ensure a prior thorough acquaintance with his antipodean black letter law before embarking on this author's very pertinent critique of the United Kingdom family law. Once he or she has, then this book will prove to put very high quality icing upon his cake.

Judicial forms of address

From time to time there is need for re-publication of the forms of address for Judges of the New Zealand Courts, both in Court and out.

Attached is a chart containing this information, and below further notes by way of explanation. The following is subject to the obvious qualification that appropriate changes are to be made for women Judges.

First, to deal with the form of address in Court about other Judges of the Court of Appeal, the High Court and the District Court. Judges of all Courts are addressed in Court as "Your Honour" or "Sir". If a first reference is to be made to the Chief Justice the correct way is "Chief Justice, Sir Ronald Davison", similarly "President of the Court of Appeal, Sir Owen Woodhouse" or "member of the Court of Appeal, Mr Justice Richardson". With subsequent references abbreviation is in order.

Some difficulty seems to arise how counsel in Court refer to High Court Judges and to District Court Judges. If reference is to be made to a High Court Judge it is correct to say simply "Mr Justice (surname)" in whatever context is required. It is unnecessary orally to preface it with "His Honour", and wrong to use "The Honourable", which is confined to written forms of address and never used in speech. The term "brother" or "brethren" is by common custom used by a Judge himself about other Judges who are members of his Court, and is a term not to be used by counsel in Court. If an introduction is required "another High Court Judge, Mr Justice (surname)" is correct.

It is wrong for counsel in a courtroom whether addressing the Court directly, or reading from a judgment to refer to a Judge as "(surname) J". The "J" stands for "Justice". The preferred use is "Mr Justice (surname)" but "(surname) Justice" is an alternative. Appropriate substitutions for initials should be made for Commonwealth and foreign Judges. If reference is to be made to a District Court Judge it should be "District Court Judge (surname)" or simply "Judge (surname)". In oral references it is unnecessary to preface it with "His Honour".

Judges of the Court of Appeal and the High Court are *never* referred to in spoken or written form as "Judge (surname)". If they have a title that is used, or "Mr Justice (surname)". For such Judges the title "Judge" is only used in informal direct address to them out of court.

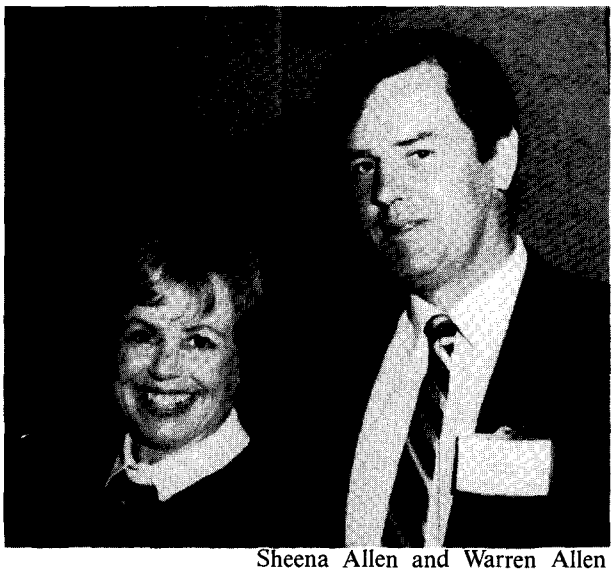
Forms of address within New Zealand judicial system

Office (N.Z.)	Correspondence		Address On Envelope
	Begin	End	
	Formal		
Chief Justice	(a) Sir	Yours faithfully	The Right Hon. the Chief Justice, Chief Justice's Chambers, High Court, Wellington.
	Semi-formal		
	(b) Dear Chief Justice	(Yours sincerely (Yours faithfully	The Right Hon. Sir Ronald Davison, G.B.E., C.M.G. (As in (a))
The President of the Court of Appeal	(a) Sir	Yours faithfully	(a) The Right Hon. the President of the Court of Appeal, Court of Appeal Chambers, Wellington.
	(b) Dear Sir Owen	(Yours sincerely (Yours faithfully	(b) The Right Hon. Sir Owen Woodhouse, K.B.E., D.S.C., President of the Court of Appeal.
Other Judges of the Court of Appeal	(a) Sir (b) Dear Sir Robin	Yours faithfully (Yours sincerely (Yours faithfully	(a) The Right Hon. Mr Justice Cooke (b) The Right Hon. Sir Robin Cooke
Other Judges of the High Court	(a) Sir (b) Dear Judge	Yours faithfully (Yours sincerely (Yours faithfully	The Hon. Mr Justice _____ The Hon. Mr Justice _____
Chief Judge of District Court	Dear Chief Judge	Yours faithfully	His Honour, Chief Judge D J. Sullivan
Judge of District Court	Dear Judge	Yours faithfully	His Honour, Judge _____
Judges of the Court of Arbitration and other Judges of Tribunals including Maori Land Court. Chief Judge is used where appropriate.	Dear Judge	Yours faithfully	His Honour, Judge _____

Note: Military and civil decorations should be added where appropriate, but not the letters "PC". All permanent members of the Court of Appeal are Privy Councillors. The above is a representative selection only of judicial offices.

LAW CONFERENCE — BUTTERWORTHS RECEPTION

During the '84 Law Conference in Rotorua Butterworths held a reception attended by many overseas guests and several New Zealand Judges and practitioners who have been authors of legal works or contributors to journals and other legal periodicals. Published on this and the succeeding page are some informal photographs taken during the reception.



Sheena Allen and Warren Allen (Wellington)

David Williams (Auckland) and Rt Hon Sir Alexander Turner

Ian Temby (Australia), Barbara Baragwanath and David Baragwanath QC (Auckland)

Caroline Rennie (Wellington), Mr Justice Cooke, and Frank O'Flynn QC MP (Wellington)

Laurie Southwick QC, Margaret Southwick (Auckland) and Peter Penlington (Canterbury)

Moira Thompson (Butterworths), Martin Fine (Butterworths), Bill Patterson (Auckland), Tim and Eve McBride (Auckland)

Insurance Intermediaries — Some Recent Legal Developments

By Dr A A Tarr, Senior Lecturer in Law, University of Canterbury

1 Introduction

There is no doubt that insurance intermediaries such as insurance agents, brokers, and loss adjusters perform vitally important functions in the insurance arena. Insurance companies necessarily must act through agents; brokers commonly are engaged to arrange and advise upon insurance cover, and loss adjusters or assessors are charged with the investigation and quantification of claims. The genus of insurance intermediaries is by no means restricted to the abovementioned three groups,[1] but it is in relation to these three broad categories of individuals that a considerable volume of case law has arisen in recent years.[2] Given the significance of tasks undertaken by them, the often substantial amounts of money at stake, and the fact that the contract of insurance is one of utmost good faith it is not surprising that insurance intermediaries should become embroiled in numerous disputes. This article examines some of the most important recent case law in an endeavour to clarify the legal position of these intermediaries.

2 Agents for whom?

Often it is by no means plain as to whose agent in law a particular intermediary is. For example in the performance of their tasks assessors normally will be acting on behalf of insurers, but it is not uncommon for the insured to seek their professional services in order to facilitate the processing of claims.[3]

Furthermore as Lush J observed in *Norwich Union Fire Ins Soc Ltd v Brennans (Horsham) Pty Ltd* [1981] VLR 981, 985, the fundamental difference between a broker and an insurer's agent is

> . . . between a person, firm or company which carries on an independent business of placing insurances upon the instructions of clients and whose basic relationship of agency is with the client, and the insurer's agent whose function is to procure persons to insure with his principal, the insurer, and whose basic relationship of agency is therefore with the insurer.

However, while this broad distinction between an insurer's agent and a broker may hold true in the majority, or even overwhelming number, of cases, it is by no means an invariable distinction. An agent under the direct employment and control of an insurer may, in certain circumstances, be held to be the agent of the insured,[5] and where a broker is not merely acting on behalf of clients in the negotiation of insurance contracts but has authority to issue interim cover on behalf of an insurer, such a broker is, in law, acting as an agent for the insurer.[6]

Moreover, it is clear that a broker may, in respect of the exercise of his functions in relation to a particular contract of insurance, be in the invidious position of being agent for both insured and insurer.[7] This is by no means uncommon in the agency context as auctioneers, solicitors, stockbrokers and others, for example, may in respect of different components of a single transaction be acting as agent for two different principals.[8] Therefore, in any discussion of the legal position of intermediaries, the sterile labelling of individuals such as brokers as being agents for the insured, or of insurer's agents as invariably being agents for the insurance company they purportedly represent, must be abandoned in favour of a careful analysis of the particular tasks performed by the intermediary in the course of effecting the relevant transaction.

3 The agent's authority

A basic rule of agency is that a principal is bound by any of the acts of his agent within the scope of the agent's actual or apparent authority and, of course, by any unauthorised act which the principal chooses to ratify.[9] Where an agent carries out his instructions properly, or where the principal decides to ratify some unauthorised action by an agent, no complications arise as the acts of the agent are binding upon the principal However, difficulties often arise where an agent perpetrates some fraud,[10] makes a misrepresentation[11] or commits some other wrong[12] and the principal seeks to avoid responsibility for what the agent has done. Whether he can do so will depend upon whether the agent was acting within the scope of his authority, actual or apparent. The cases that follow serve to illustrate the crucial nature of any inquiry into the nature and extent of an agent's authority.

In *British Bank of the Middle East v Sun Life Assurance Co of Canada (UK) Ltd* [1983] 2 Lloyds Rep 9 a "branch manager" of the defendant insurance company made unauthorised and false representations to the plaintiff as to the authority of a "unit manager" who worked under his control. The unit manager had executed undertakings on behalf of Sun Life in terms of which Sun Life agreed to repay to the bank certain sums advanced by the bank to a third party. The manager of the bank wrote to Sun Life UK asking for confirmation that the unit manager was empowered to issue undertakings of this nature under his sole signature. This letter was addressed to the "general manager" of Sun Life, a title which did not exist, and the branch manager took it upon himself to reply that the unit manager was so authorised. The key issue was whether the

undertakings were binding on Sun Life UK; that is, did the employee of Sun Life UK have its authority actual or ostensible to execute the undertakings on its behalf? Counsel argued that the branch manager by his letter represented that the unit manager had such authority and that the branch manager himself had either the implied actual authority, or alternatively the ostensible authority of Sun Life to make that representation about the unit manager on its behalf.

Lord Brandon of Oakbrook, delivering the unanimous judgment of the House of Lords, had little difficulty in rejecting the first argument. The evidence, oral and written, clearly disclosed that neither the branch manager nor the unit manager had actual authority, express or implied, to approve undertakings of this sort and therefore it would be impossible to sustain the argument that the branch manager had implied actual authority to represent that the unit manager had actual authority to execute singly undertakings on its behalf.

The second part of the bank's case was also unsuccessful. As Lord Brandon observed in his speech at p 7, it could not be said that the branch manager by answering a letter addressed to someone in top echelons of management "thereby became clothed with the actual authority, express or implied, of that company to send the answer to that letter which he did send". Furthermore, there was no evidence of conduct by branch managers towards their customers, known of and approved by Sun Life UK, which could possibly be interpreted as a representation that such persons had authority to sign any contract on behalf of Sun Life. In fact, the limited authority given to branch managers by Sun Life accorded with general industry practice as all other insurance companies dealing directly with the public had similar operational infrastructures. Consequently, it was held that there was no reason for the bank to suppose that the branch manager had authority to do what he did.

Unfortunately Lord Brandon did not take this opportunity to "tackle head-on" the observations of Diplock LJ in the leading case of *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480. Lord Diplock stated, inter alia at pp 504-505, that one of the conditions before a third party can enforce a contract against a company entered into on behalf of that company by an agent who had no actual authority to contract on its behalf, is that any representation that the agent had authority must emanate from a person having actual authority to make that representation;[13] that is, successful reliance upon the apparent authority of an agent is only possible where the representation of such authority has come from a person having actual authority to make the representation. Reynolds,[14] while conceding that apparent authority of an agent of a company must in the last resort derive from the representations of a person who had actual authority to make them, argues that this "does not exclude, at the lower level, one person having apparent authority to act so as to create apparent authority in another". Lord Brandon, in considering the argument that the branch manager had apparent authority to make the representations as to the unit manager's authority, presumably has endorsed the validity of this contention.

This area of agency law awaits further clarification but it is respectfully submitted that Reynolds is correct. The foundation of apparent authority is the estoppel which arises where a principal by his words or conduct has represented or permitted to be represented that the agent has authority to act on his behalf – the representation when acted upon by the third party operates as an estoppel preventing the principal from denying that he is bound by the agent's acts.[15] In the final analysis, therefore, any reliance upon the apparent authority of an agent must be *traced back* to some express or implied representation by the principal. However, recognition of this does not mean that there can be no apparent authority and no estoppel where there is a representation by someone who could bind the principal – even if that someone does not have actual authority, but only apparent authority.[16]

More straightforward is the situation where the principal by providing the agent with indicia of authority has enabled him to act as if he had actual authority to transact certain business on behalf of the insurer. A recent case that illustrates this situation is *Derham and Derham v Amev Life Assurance Co Ltd* (1982) 2 ANZ Insurance Cases No 60-459 (Act Sup Ct). An agent armed with business cards bearing the defendant's name, and letterheads, memo pads and notification forms supplied by Amev and bearing its name persuaded the plaintiffs to cancel existing life insurance policies in favour of policies with the defendant. An interim receipt in respect of a premium payment was issued by the agent and this receipt was headed with the defendant's name and place of incorporation. At the relevant time the agent was working for a company employed by Amev as its general agent for life insurance business, and in his endeavours to persuade the Derhams to change their life insurance he fraudulently represented that certain investment benefits were to be gained through Amev policies. The plaintiffs sought to recover, inter alia, the money they had paid the defendant in respect of the policies they had taken out with the defendant. They asserted that the defendant by its words or conduct had represented that the agent had authority to act on its behalf and was therefore bound by the acts of the agent to the same extent as if he had actual authority.

This argument was accepted by Kelly J who held that the defendant in arming the agent with indicia of authority, such as forms, business cards and an interim receipt book, had represented or permitted to be represented that the agent had authority to act on its behalf to solicit and obtain life insurance business and to receive money in connection therewith. In conferring such authority Amev became bound by any and all relevant and reasonable inducements made by the agent in soliciting the proposals. Given that the fraudulent representation as to investment benefits fell within this category, the learned Judge had no hesitation in holding that Amev as principal was liable to make good the plaintiffs' losses sustained through the agent.[17]

Notwithstanding the fact that the plaintiffs had received life insurance cover for a twelve-month period during which time premiums were paid, the Court ordered that the plaintiffs were entitled to recover all the premiums. Reference was made to *Kettlewell v Refuge Assurance Co* [1909] AC 243 where the House of

Lords unanimously (and contemptuously) dismissed any argument that a principal could keep any money derived through the fraud of an agent. In New Zealand recourse by an insurer to the Contractual Remedies Act 1979, s 9, may be of assistance as the Courts are empowered to grant discretionary relief in such circumstances.

Finally, before leaving this brief discussion of the agent's authority, it must always be appreciated that an act done by an agent in excess of his actual authority will not be binding upon his principal where the third party has notice of the lack of, or limitation to, the agent's authority.[18] A third party who knows that an agent lacks authority to negotiate a particular transaction or to make certain representations, for instance, can not rely upon any prior representation by the principal that clothes the agent with apparent authority. No difficulty arises where the third party has actual knowledge of the limitations on the agent's authority, but the situation is less plain where it is asserted that there are circumstances from which the third party should have been put on inquiry as to the agent's powers: *Dutch Sisters Inn (1969) Ltd v Continental Ins Co* [1978] I-LR 970.

It is suggested[19] that where the agent is acting within the scope of the usual authority of a person holding the position which he holds there will not normally be a duty to inquire unless there are some particular circumstances giving rise to suspicion: *Rockland Industries Inc v Amerada Minerals Corporation of Canada Ltd* (1980) 108 DLR (3d) 513. However, unless and until some suspicious circumstance arises from which a reasonable person might be prompted to make inquiries, the third party is safe while the agent is transacting the usual kind of business that an agent of that kind would transact.

4 Imputing the agent's knowledge

Another area of vital importance in the relationship of principal and agent is that of imputed knowledge. What, for example, is the position where facts material to a transaction are known to an agent but are not communicated to the principal? This is of particular importance in the context of non-disclosure for if the knowledge of the agent of material facts can be imputed constructively to his employer, the insurer, a defence of non-disclosure will be defeated.

In *Peters v National Insurance Co of New Zealand Ltd* (High Court, Wellington, 21 May 1982, A321/80; Quilliam J) the insured did not read a proposal form for insurance against burglary and housebreaking and all the answers to various questions were filled in by a Mr Smith, an inspector for the defendant insurance company. The insurer successfully disclaimed liability in respect of a burglary loss contending that the insured had failed to disclose material facts relating to prior thefts and burglaries. It was held that the misstatements were substantially incorrect and material in terms of ss 5 and 6 of the Insurance Law Reform Act 1977; see judgment at pp 5-7. It was argued by the insured that Mr Smith had brushed aside the insured's references to prior burglaries and had not even asked about thefts; that is, that there had been full disclosure in respect of prior burglaries but the agent had failed to record the information in completing the proposal, and had omitted to ask any information about thefts at all! However the Court declined to accept this account of the events and held that there was non-disclosure of a material nature and that this breach of the duty of utmost good faith could not be attributed to the insurer's agent.

The situation would, of course, have been quite different had the evidence disclosed that the agent had failed to record material information disclosed to him. The legislature in New Zealand has relegated the wholly unsatisfactory approach as exemplified by *Newsholme Bros v Road Transport & General Insurance Co Ltd* [1929] 2 KB 356 (CA) to "mothballs". This case established that an agent for an insurance company in completing a proposal form was merely an amanuensis of the insured and that knowledge of the true facts by the agent could not be imputed to the insurer; therefore, the insurer could repudiate liability on the ground of incorrect answers which related to previous losses. However the Insurance Law Reform Act 1977, s 10(2), states that an insurer

> . . . shall be deemed to have notice of all matters material to a contract of insurance known to a representative of the insurer concerned in the negotiation of the contract before the proposal of the insured is accepted by the insurer.

A broad definition of "representative of the insurer" is given in s 10(3) and includes any servant or employee of the insurer and extends to incorporate persons such as insurance brokers, solicitors or motor vehicle dealers who receive commission from an insurer for cover placed with the latter. However, the imputation of knowledge will only take place where the representative is acting for the insurer during the course of the negotiation of the contract of insurance and where the representative is acting within the scope of his actual or apparent authority: s 10(1).

Consequently, information which is acquired by an agent of the insurer who is totally unconnected with the relevant transaction is not imputed to the insurer,[20] and this requirement that the representative must act for the insurer during negotiations would presumably rule out brokers who are approached by prospective insureds to arrange insurance cover on their behalf.[21] The effect of s 10 therefore is confined to the period leading up to the formation of the contract of insurance — in respect of this period, the insurer is deemed to have notice of material matters known to his representative and if he issues a policy with "knowledge" of facts entitling him to repudiate or decline acceptance, he will be estopped from relying on those facts: *Carter v Boehm* 3 Burr 1905, 1910; *Blackley v National Mutual Life Association of Australasia Ltd* [1972] NZLR 1038, 1049.

The doctrine of imputed knowledge may, of course, be of considerable significance in respect of other issues. For example, the agent may know of something which constitutes a breach of warranty or condition by the insured and if his knowledge is imputed to the insurer, the insurer may, by subsequently accepting premiums, be deemed to have waived the breach: *Wing v Harvey* (1854) 5 De GM & G 265. What knowledge will be imputed will depend upon the status of the agent receiving it; that is, upon his actual or apparent authority. For example in *Stateliner Pty Ltd v Legal & General Assurance Society Ltd* (1982) 2 ANZ Insurance Cases No 60-455 (Full Court of the Supreme Court of South Australia); the question was whether knowledge by a bus driver of the unsafe condition of a vehicle could be imputed to his employer, the insured. King CJ held that

> The problem of whose knowledge is to be regarded as the knowledge of the corporation must be solved by applying the relevant principles of corporation law. It must be somebody who is not merely a servant or agent for whom the company is liable upon the footing of "respondent superior", but someone who is so identified with the company itself that his knowledge is treated as the knowledge of the company.[22]

Therefore, the Chief Justice of the Supreme Court of South Australia held that knowledge by the bus driver of the defective brakes could not be imputed to the insured.

Consequently, while the knowledge of persons such as senior management personnel, district or branch managers, and inspectors will readily be imputed to the insurer, this will not be the case for all agents and/or employees: *Maye v Colonial Mutual Life Assurance Society Ltd* (1924) 35 CLR 14; *Ayrey v British Legal and United Provident Assurance Co Ltd* [1918] 1 KB 136; *Stone v Reliance Mutual Insurance Society Ltd* [1972] 1 Lloyd's Rep 469. The imputation to the principal of the knowledge of an agent when material information has been passed on to him in reliance upon his apparent authority to receive it is an application of the principles of estoppel: *Blackley v National Mutual Life Association of Australasia Ltd* [1972] NZLR 1038, 1049; per Turner P. No estoppel will arise where the agent does not have authority to receive the communication in question, and a third party would also fail if he knew or believed that the disclosures had not in fact been or would not in fact be passed on to the principal: *Blackley's* case, and see also *Auckland City Corporation v Mercantile & General Ins Co Ltd* [1930] NZLR 809, 820. In every case, therefore, it is a question of fact whether the knowledge was acquired by the agent while he was acting within the scope of his actual or apparent authority.

5 The agent's duties

A duty that frequently arises for consideration by the Courts is that of execising reasonable care and skill. Where the agent has failed to carry out the terms of the agency agreement, or has failed to perform his obligations with care, the principal may bring an action against him for breach of contract, or in negligence.[23] It has been suggested by the Ontario Court of Appeal in the important case of *Fine's Flowers Ltd v General Accident Assurance Co* (1978) 81 DLR (3d) 139 at 143-145 that the liability of an agent for failure to act with care may be founded in equity as arising out of the fiduciary relationship between principal and agent.

This writer, however, respectfully concurs in the submission of Fridman where that writer points out that "equity comes into play more appropriately where some allegation of 'dishonesty' is made against an agent"; that is, in cases in which questions of loyalty, fidelity, honesty and the like have been raised by principals seeking to avoid the payment of commission or to obtain an accounting of secret profits: see, for example *Boardman v Phipps* [1967] 2 AC 46; *Industrial Development Consultants Ltd v Cooley* [1972] 2 All ER 162; *Westminster Chemical NZ Ltd v McKinley* [1973] 1 NZLR 659. Where a failure to exercise due care and skill is in issue, the overwhelming majority of cases have considered liability on the twin bases of contract and negligence. See, for example *Osman v J Ralph Moss Ltd* [1970] 1 Lloyds Rep 313 (CA); *Esso Petroleum Co Ltd v Mardon* [1976] QB 801 (CA); *Pennant Hills Restaurants Pty Ltd v Barrell Insurances Pty Ltd* (1981) 55 ALJR 258 (HC Aust); and cases cited below. This article shall now examine some recent case law in an endeavour to clarify the obligations of an agent in the performance of his duties.

A significant number of cases have involved insurance brokers which suggests that the brokers' duty to procure satisfactory insurance cover within a reasonable period of time is not always performed with the requisite standard of care and skill which can reasonably be expected of those engaged in that profession. For example, in *Zisophoulos v Barry Johnston (Insurance Brokers Ltd* (1982) 2 ANZ Insurance Cases No 60-461 (ACT Sup Ct) the plaintiff insured claimed damages in negligence against the defendant brokers for arranging motor vehicle insurance on his behalf with an insurer who subsequently went into liquidation and was unable to pay a claim made by the plaintiff. Connor J at 77, 576 held that

> . . . if [the broker] had acted with the care and skill which it was reasonable to expect from an insurance broker he should have realised that the insurer, which he had selected for the plaintiff, was in a doubtful financial position and should have warned the plaintiff of it and advised him to get cover from another insurer. In failing to do so I think that the defendants . . . were negligent.

This case, like the earlier English case of *Osman v J Ralph Moss* [1970] 1 Lloyd's Rep 313, clearly establishes that the broker must take due care in advising his client with whom to insure. *Zisopoulos'* case is particularly clearcut in that the broker had actual knowledge that the insurer was to cease trading but accepted a spurious explanation given by a director of the insurance company when further straightforward investigation of the circumstances would have revealed the truth.

Another interesting case is *Fanhaven Pty Ltd v Bain Dawes Northern Pty Ltd* [1982] 2 NSWLR 57; (1982) 2 ANZ Insurance Cases No 60-480 (NSW CA) which deals with the broker's position in respect of the duty of the insured to disclose material facts and not to make misrepresentations. The significance of the broker's duty in this area cannot be underestimated as the insured in dealing with the broker will rarely have direct contact with the insurer, and the broker's position as intermediary is vital.

In the *Fanhaven* case the appellant insured suffered losses from risks purportedly covered by policies of insurance arranged on its behalf by the respondent brokers. However the insurers repudiated the policies on the ground that there had been non-disclosure of the criminal records of men controlling and associated with the conduct of the appellant's business. It being conceded that the insurer was entitled to repudiate the policies, the issue before the New South Wales Court of Appeal was: does the broker's duty to exercise due care and skill in the performance of its obligations include a duty to advise its clients to disclose all material facts, and, if so, does it extend to advising on the meaning of material facts and to indicating the nature and extent of the duty of disclosure? In dismissing the appeal from the judgment of Yeldham J, the Court of Appeal emphasised that the scope of the broker's duty must in

each case be ascertained by reference to the particular facts.

In this case there was nothing to suggest to the broker that there was anything untoward about the moral character of his client. Reynolds JA stated at p 63 that the matter might have been different had there been some "questionable matter which might impose upon him a special duty in the circumstances". The learned Judge of Appeal stated that cases can arise where the factual situation demands that a broker inform his client as to the broad requirements of insurance law, but that the case before him was not of this genus. Therefore, Reynolds JA held that the exercise of reasonable care required of a broker did not demand that the broker inform an insured of his obligation to disclose material matters, other than those to which questions in the proposal referred, or to inquire from the insured whether the directors or any senior management personnel had criminal records.

Moffit P concurred in the judgment, as did Hutley JA in the conclusion reached that the appeal should be dismissed. However Hutley JA at p 66 added the following gloss; namely, that where a proposal does not incorporate a general question inviting the disclosure of *any other* material facts, it is incumbent upon a broker to advise a client that the questions posed are not exhaustive and that there may be material facts outside the listed questions which ought to be disclosed.

The decision reached in this case strikes, with respect, a sound balance between the interests of the insured on the one hand and the broker on the other. There is ample authority to support a contention that the broker is under an obligation to proffer sound advice to his client[24] – the difficulty is to determine the scope or limits of this obligation. As Hutley JA observes in the *Fanhaven* case at p 65:

> The submission that the broker does not have to expound the law to the insured, in my opinion, misses the point; of course he does not, but that does not mean that he may not have to point out legal pitfalls to the insured where these may arise in the course of the effecting of valid insurance cover, which is his work as a broker.

Of course, the extent of his duty in this regard will depend upon his knowledge of special circumstances, his relationship with the client in question, and the particular facts of the case.[25] A broker cannot be expected to draw to his client's attention the necessity to disclose previous criminal convictions where there is nothing to suggest that his client is anything other than a respectable businessman – to demand otherwise would be tantamount to demanding that insurance brokers run the risk of offended clients taking their business elsewhere. Similarly, where a broker is acting as little more than a conduit for the passing of messages between an insurer and agent of the insured, his failure to alert an insured of pitfalls in a policy is excusable. Conversely, where the broker is directly consulted and has knowledge of special circumstances pertaining to a particular policy, he will be liable for breach of duty if he does not alert the insured to these special circumstances or legal pitfalls: *McNealy v Pennine Ins Co Ltd* [1978] 2 Lloyd's Rep 18; [1978] RTR 285 (CA). Furthermore, the suggestion in *Fanhaven's* case at p 66 per Hutley JA that, where the proposal form is silent or does not allude to the necessity to disclose material facts beyond the scope of questions posed in the proposal it is incumbent upon the broker to draw this to the attention of the insured, seems to be eminently sensible, and a desirable practice.

Other cases involving insurance intermediaries in recent years have been more straightforward. In *Pennant Hills Restaurants Pty Ltd v Barrell Insurances Pty Ltd* (1981) 55 ALJR 258 (HC Aust) an insurance broker failed to effect appropriate workers compensation insurance for Pennant, one of its clients. The failure to so insure its client was negligent and constituted a breach of contract, thereby exposing the broker to liability. As a result of the default of the insuance broker to effect this insurance cover, Pennant became liable following the injury to one of its workers to make contributions to an Uninsured Liability Fund; the High Court of Australia ordered that the broker pay as damages a sum that would put Pennant in the same position as if it did not have to make those payments. See, in particular, the comments of Gibbs J, at 261; and see *Fraser v Furman* [1967] 1 WLR 898.

Similarly, in *Gold Star Insurance Co Ltd v Dominion Adjusters Ltd* [1982] 2 NZLR 38 (CA) the New Zealand Court of Appeal held[26] that a loss adjuster who had failed to exercise reasonable care in the performance of his duties was liable to recompense the insurer for the amount it had paid out under a policy of motor vehicle insurance. The policy in question contained a clause exempting the insurers from liability if the driver had been affected by intoxicating liquor at the time of the accident and an inquest into the driver's death found that there was a substantial concentration of alcohol in the deceased driver's blood. The assessor, who did not attend the inquest, made no mention of alcohol impairment in his report, and the insurer duly paid out. Woodhouse P and Sir Thaddeus McCarthy concluded that the assessor had made an elementary mistake in failing to discover and report on the driver's blood alcohol count and as a consequence the assessor's performance of the contract fell far below what could reasonably be expected.

It is plain, therefore, that the intermediary in the performance of his duties to arrange insurance cover, or in carrying out the terms of his agency agreement, or in investigating the quantum and validity of claims, must exercise due care, otherwise the principal may bring an action against him for breach of contract, or in negligence: see further *Rearden v Kings Mutual Ins* (1981) 120 DLR (3d) 196; *Mint Security Ltd v Blair* [1982] 1 Lloyd's Rep 188.

6 Bankruptcy of agents

Recent liquidations of insurance brokers have raised nice questions as to liability for payment of premiums.[27] Is the insured liable to make further payment to an insurer where he has already paid a broker the premium due for the policy in question, but before transmission of this premium the broker has gone into liquidation? As far as marine insurance is concerned, the position is that where a marine policy is effected on behalf of an insured by a broker, the broker is directly responsible to the insurer for the premium in the absence of an agreement to the contrary; that is, the insured is discharged from any further responsibility to pay the premium where for whatever reason the broker defaults.[28]

Sutton[29] explains that Marine

Insurance Act provisions to this effect derive from the English Court of Appeal decision in *Universo Insurance Co of Milan v Merchants Marine Insurance Co Ltd* [1897] 2 QB 93 where it was held that by long established custom in marine insurance the insurer looks to the broker alone for payment of the premium and not to the insured. However the position as regards general insurance has been unclear[30] and it is for this reason that the decision in *Norwich Winterthur Insurance (Australia) Ltd v Con-Stan Industries of Australia Pty Ltd* [1983] 1 NSWLR 461; (1983) 2 ANZ Insurance Cases No 60-513 is to be welcomed.

In this case the question for resolution was whether the insureds remained liable to the insurer for payment of premiums in respect of policies for general insurance, having already paid to brokers these premiums – the brokers were in liquidation and had failed to pay these premiums to the insurers. In the Court *a quo*, [1981] 2 NSWLR 879; (1982) 2 ANZ Insurance Cases No 60-457, Rogers J held that the contracts of insurance contained an implied term, based upon commercial usage and business efficacy, that payment to the broker by the insureds was a good discharge of their liability to the insurers. The insurers appealed, disputing the existence of any such implied term and contending that it was entitled to recover from the insureds premiums due and still unpaid. The New South Wales Court of Appeal held by a majority of 2-1 that the appeal should be allowed.

Two main arguments were advanced on behalf of the insureds. First, that the structures and practices of the insurance industry required that there should be implied in the contract between the insured and the broker, and the contract between the broker and insurer, a provision that the payment of the premium to the broker is the only obligation to pay the premium which the insured incurs when he effects *any* policy, marine or non-marine, with an insurer through a broker, and that only the broker was in turn liable to the insurer for that premium. Alternatively, the insureds sought to rely upon the implied term found by the trial Judge.

All three Judges, Hutley, Glass and Mahoney JJA, were in agreement that to found an implied term upon mercantile custom or usage, the existence of the custom or usage must be strictly proved as a question of fact and must be "so notorious that everybody in the trade enters into a contract with that usage as an implied term".[31] However, only Hutley JA concluded that the evidence disclosed a notorious custom to the effect that in the event of a default by a broker the insurer would not claim the premium from the insured.

Glass JA held that this alleged usage had not been established[32] added that neither of the implied terms (as suggested by counsel for the insured or by Rogers J) could be incorporated into the contract for the purposes of business efficacy. The learned Judge held at 77, 921 that:

> No such result will ensue unless both the parties would clearly have intended the term or would certainly have included it, if the contingency had occurred to their minds, or the term is so obvious that it goes without saying, both of which formulations were approved in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 56 ALJR 459 (HCA).[33]

Glass JA decided that neither qualifying condition for introducing either of the suggested implied terms existed. Similarly Mahoney JA held that payment of the premiums to the broker did not relieve the insured from liability to make further payment to the insurer as he found, as a matter of fact, that the suggested usage had not been established.

Therefore, in the absence of specific arrangements between the broker and insurer as to the payment of premiums, or of an established mercantile custom or usage, payment of a premium to a broker in respect of a non-marine insurance policy does not relieve the insured of liability to make another payment where the broker does not pay the insurer the premium. This is the logical outcome of the analysis of the parties legal position; in the overwhelming number of cases the broker will be acting as agent for the insured in arranging cover and making payment, and payment by the principal of the premium to his agent does not amount to payment to the third party, the insurer.

The insured, of course, has his remedies against the broker to account for any premium paid to him and also for any loss suffered by the insured through any failure to secure satisfactory cover. Where the broker is in liquidation this right of action is a poor palliative, and a requirement that brokers pay such moneys into a trust account,[34] or a requirement that premiums be more expeditiously remitted,[35] may be of considerably more tangible benefit to the insured.

7 The agent's right to commission

The major obligation of the principal is to pay the agent his commission, the remuneration agreed upon by the parties as the agent's reward for performing the undertaking. Two important facets of the obligation to pay commission fell to be considered by the New Zealand Court of Appeal in the recent case of *Prudential Assurance Co Ltd v Rodrigues* [1982] 2 NZLR 54; (1983) 2 ANZ Insurance Cases No 60-502. The respondent acted as life insurance representative for the appellant company and his written agency agreement provided for payment of commission linked to the actual receipt of premiums by the company. However, in order to provide a stable income for its agents, the insurer adopted a system of payment at variance to the terms of the written agreement and made voluntary prepayments of commission.

The actual method of payment was explained to the respondent and later elaborated upon in a printed guide issued to the respondent and other agents. When the respondent lawfully terminated his agency agreement, the company had paid the respondent in advance of his entitlement under this written agreement a sum of $11,603; the company in fact sought to recover only $8,467, which represented commission paid on policies which he had arranged which subsequently lapsed for non-payment of premiums.

Two clauses in the written agreement were of crucial importance. Clause 12 provided that on termination of the agency agreement

> the representative will not be entitled to any commission . . . or other remuneration which at the date of termination shall not have become due and payable by Prudential to the representative.

Clause 2(d) provided that the representative must repay to the company any commission "which is in excess of the amount provided for" in the schedule of rates; in particular, it was provided that where policies lapsed for non-payment of premiums

in the first six months, the representative should repay any commission credited in respect of these policies.

In the High Court, (Auckland, 18 December 1981, A201/79) Sinclair J held in favour of the agent and the insurer appealed against his finding that the agent's entitlement to commission was to be determined by reference to the actual method of payment adopted by the insurer, and that cl 12 of the agreement operated as an unreasonable restraint of trade upon the agent.

The Court of Appeal unanimously upheld the appeal. It was held that the method of payment, adopted for the benefit of the agent, never supplanted the agency agreement as "the source of the ultimate rights and obligations of the parties", (per McMullin J at 61; see also Cooke J, at 56; and Somers J, at 65-66. Consequently the legal entitlement to payment and voluntary method of payment should not be confused; the agent's legal entitlement was as defined in the agreement and he was obliged to repay pre-payments of commission in excess of the entitlement. McMullin J would, even in the absence of an express provision in the agency agreement, have upheld the insurer's claim on the basis that there was an *implied* term "that the agent was to repay on the termination of his agency any overpayment of commissions previously made to him". See the judgment, at 61, and see *BP Refinery (Westernport) Ltd v Shire of Hastings* (1977) 16 ALR 363, 376 (PC).

The restraint of trade argument also failed. The Court did not accept that cl 12 amounted to an unreasonable restraint of trade by operating as a forfeiture and powerful means of inducing the agent to remain in his employment. As McMullin J pointed out at p 62:

> In a sense cl 12 might discourage an agent from terminating his agency. Any provision which brings remuneration or work-related rights to any end on the termination of a contract of service will be in that category. But such a provision can hardly be said to be a restraint of trade in any legally effective sense. In *Stenhouse Australia Ltd v Phillips* [1974] AC 391, Lord Wilberforce said that whether or not a particular provision is a restraint of trade is to be determined, not by its form, but by its effect in practice.

The question therefore whether a particular provision amounts to an unreasonable restraint of trade is a question of degree, and in this instance the Court of Appeal held that the disincentive to leaving embraced by cl 12 was no more than was reasonable. See also *McCulloch v Provident Life Assurance Co Ltd* (High Court, Wellington, 10 September 1971; Quilliam J); *Beavon v Australasian Temperance and General Mutual Life Assurance Society Ltd* (High Court, Auckland, 18 December 1981; Holland J).

8 Conclusions

The following observations are advanced by way of conclusion to this article.

(a) In determining whether a principal is bound by the unauthorised acts of his agent, or is affected with notice of information acquired by his agent, the crucial inquiry is whether the agent was acting within the scope of his actual or apparent authority. Actual authority, express or implied, is comparatively easy to determine. However, apparent or ostensible authority and the boundaries and nature thereof, is a much more complex question. Given that words or conduct can be variously interpreted, it is not surprising that difficulties arise — the very basis of apparent authority is that the principal has represented or permitted to be represented that some person has authority to act on his behalf and therefore the focus of attention is upon the principal and powers of the agent. This writer respectfully concurs in the suggestion of Reynolds[36] that some problems may be obviated by looking more closely at the agent. By devoting more attention to the situation into which the agent is put the determination of the fact of agency and his ability to affect the legal position of another person may be more readily resolved.

(b) The agent who fails to perform his duties with reasonable care and skill may be liable for breach of contract, or in negligence. Furthermore, while the matter awaits clarification in New Zealand, it will not be a confident counsel who asserts that the existence of a contractual relationship between broker and client, insurance agent and insurer, or assessor and insurer, precludes liability in tort.[37]

(c) Legislative controls over the activities of insurance intermediaries may take numerous and diverse courses; for example, licensing requirements may be instituted, compulsory professional indemnity and fidelity insurance may be required, and trust account rules may be introduced requiring that all premiums and claims settlements, for instance, must be deposited into such accounts.[38] However, before any governmental intervention is justified it must be demonstrated that market forces and the common law have proved inadequate. It is suggested that this has not been the case in New Zealand. There is not the same history of insurance broker liquidations that have prompted calls for regulation in Australia,[39] the insurance industry itself has established standards of conduct and practice that make legislative incursions into the marketplace unnecessary,[40] and the common law has not been found wanting as a vehicle for relief.

(d) Finally, this writer would, with respect, endorse the comment of the President of the Insurance Institute of New Zealand, Mr G T Rollo, in *The Insurance Institute of New Zealand Journal*, September 1982, at p 1, when he observes:

> Continuing education, in the form of residential courses as well as single day seminars, is essential if [the insurance industry] are to provide the high level of skill and efficiency which the buying public expects . . . and which they are entitled to receive. □

1 For example, senior management personnel, district (or area) managers, inspectors, office staff, collecting agents and employee loss adjusters may all be subsumed under the umbrella of insurer's representatives. See Thomas, *Guidebook to Insurance Law in Australia and New Zealand (1981)*, 141-147.

2 See, for instance, the following cases: *Fines Flowers Ltd v General Accident Assurance Co of Canada* (1978) 81 DLR (3d) 139 (Ontario CA); *Pennant Hills Restaurants Pty Ltd v Barrell Insurance Pty Ltd* (1981) 55 ALJR 258; (1981) 34 ALR 582 (HC Aust); *Mint Security Ltd v Blair* [1982] 1 Lloyd's Rep 188 (QBD); *Excess Life Assurance Co Ltd v Firemen's Insurance Co* [1982] 2 Lloyd's Rep 599 (QBD); *Gold Star Insurance Co Ltd v Dominion Adjusters Ltd* [1982] 2 NZLR 38 (CA); *Prudential Assurance Co Ltd v Rodrigues* [1982] 2 NZLR 54 (CA); *Commonwealth Ins Co v Groupe Spinks SA* [1983] 1 Lloyd's Rep 67 (QBD); *British Bank of the Middle East v Sun Life Assurance Co of Canada (UK) Ltd* [1983]

2 Lloyd's Rep 9 (HL); *Norwich Winterthur Ins, (Australia) Ltd v Con-Stan Industries of Australia Ltd* [1983] 1 NSWLR 461; (1983) 2 ANZ Insurance Cases No 60-513 (NSWCA); *Norwest Refrigeration Services Pty Ltd v Bain Dawes (WA) Pty Ltd* (1983) 2 ANZ Insurance Cases 60-507 (WA Sup Ct FC).

3 See for example: *Harris Trustees Ltd v Power Packing Services Ltd* [1970] 2 Lloyd's Rep 65; J K Maxton and A A Tarr, "The Legal Position of Assessors and Loss Adjusters", [1981] NZLJ 499.

4 See also *Re Colin Williams (Insurance) Pty Ltd* [1975] 1 NSWLR 130, 135.

5 See *Newsholme Bros v Road Transport & General Ins Co Ltd* [1929] 2 KB 356 where the English Court of Appeal held that where a proponent requested an insurer's agent to fill in a proposal on his behalf, the insurer's agent was acting as agent for the insured; see also *O'Connor v Kirby* [1972] 1 QB 90; *Australian Mutual Provident Society v Derham* (1979) 1 ANZ Insurance Cases No 60-009; but compare *Stone v Reliance Mutual Ins Society Ltd* [1972] 1 Lloyd's Rep 469 and see the Insurance Law Reform Act 1977 (NZ), s 10.

6 See *Stockton v Mason* [1978] 2 Lloyd's Rep 430; *Woolcott v Excess Ins Co Ltd* [1979] 1 Lloyd's Rep 231, 240.

7 See *Anglo-African Merchants v Bayley* [1970] 1 QB 311; *North and South Trust v Berkeley* [1971] 1 WLR 470; *Northwestern Mutual Ins Co v O'Bryan* (1974) 51 DLR (3d) 693.

8 See *Emmerson v Heelis* (1809) 2 Taunt 38 (auctioneer); *Gavaghan v Edwards* [1961] 2 QB 220 (solicitors); *Jones v Canavan* [1971] 2 NSWLR 236 (stockbrokers). This practice, however, is fraught with danger as the agent may find himself in the position where there is an irreconcilable conflict of interests; in pursuing the interests of one principal he will breach his duty to the other unless that other has given his informed consent to the transaction. See, for example, *Fullwood v Hurley* [1928] 1 KB 498, 502; *Eagle Star Ins Co v Spratt* [1971] 2 Lloyd's Rep 116, 133; *Excess Life Assurance Co Ltd v Firemen's Ins Co* [1982] 2 Lloyd's Rep 599.

9 *Bowstead on Agency* (14 Ed, 1976), ch 7; Fridman, *The Law of Agency* (4 Ed, 1976), ch 9.

10 See, for example *Hambro v Burnand* [1904] 2 KB 10; *Australian Mutual Provident Society Ltd v Derham* (1979) 1 ANZ Insurance Cases No 60-009; *Derham v Amev Life Assurance Co* (1982) 2 ANZ Insurance Cases No 60-459.

11 See, for example, *Refuge Assurance Co Ltd v Kettlewell* [1909] AC 243; *City Mutual Life Assurance Society Ltd v Gates* (1983) 2 ANZ Insurance Cases No 60-501; (1983) 43 ALR 313.

12 See, for example, *Colonial Mutual Life Assurance Society Ltd v Producers' and Citizens' Co-Operative Co of Australia Ltd* (1931) 46 CLR 41 (Insurance company held liable for defamation of another company committed by its agent in the course of soliciting business).

13 See also *Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising and Addressing Co Pty Ltd* [1975] VR 607; (1975) 133 CLR 72; *Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549, 593.

14 [1983] JBL 409.

15 See, for example *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480, 503; *Rama Corporation Ltd v Proved Tin and General Investments Ltd* [1952] 2 QB 147, 149-150.

16 It is interesting to note that Laskin CJC would support a much more significant development; that is, the learned Chief Justice of the Canadian Supreme Court states in *Canadian Laboratory Supplies v Engelhard Industries Ltd* (1979) 97 DLR (3d) 1, at 10, that there may be circumstances where a representation *by an agent* as to the extent of his authority may amount to a holding out by the principal – this "will depend on what it is an agent has been assigned to do by his principal, and an overreaching may well inculpate the principal". But compare *Attorney-General for Ceylon v Silva* [1953] AC 461, 479; *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd, supra*, at 505. See also Fridman, "Annual Survey of Canadian Law: Commercial Law", (1981) 13 Ottawa LR 571, 589.

17 See also *Mackie v European Assurance Society* (1869) 21 LT 102; *Berryere v Firemen's Fund Ins Co* (1965) 51 DLR (2d) 603; *Royal-Globe Life Assurance Co v Kovacevic* (1979) 22 SASR 78.

18 See, for example *Henry v Agricultural Mutual Assurance Assn* (1865) 11 Gr 125; *Levy v Scottish Employers Ins Association* (1901) 17 TLR 229; *Wilkinson v General Accident Fire & Life Assurance Corpn Ltd* [1967] 2 Lloyd's Rep 182.

19 *Bowstead on Agency* (14 Ed, 1976), at 253-254.

20 The Contracts and Commercial Law Reform Committee in their report on *Aspects of Insurance Law (1)* April 1975, at para 25, observe that "it would be quite unfair for an insurer to be put at risk if one of its employees, perhaps in another part of the country, has some relevant knowledge but is unaware of the negotiation of the policy".

21 See Sutton, *Insurance Law in Australia and New Zealand (1980)*, at 199.

22 (1982) 2 ANZ Insurance Cases, at 77, 477; see also *Leonard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705, 713; *H L Bolton (Engineering) Co Ltd v T J Graham & Sons* [1957] 1 QB 159; *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, 170.

23 The "rule" as derived from *McLaren Maycroft & Co v Fletcher Development Co Ltd* [1973] 2 NZLR 100 (CA) that the existence of a contractual relationship will exclude an action in tort for want of professional care is open to serious doubt. See, for example, *Port v New Zealand Dairy Board* [1982] 2 NZLR 282, at 302-303, where Bisson J, with respect, convincingly sets out reasons why *McLaren Maycroft* cannot be taken as laying down a rule that the existence of a contract limits the parties obligations to those arising out of contract. See also Sutton and Mulgan, "Contract and Tort" [1980] NZLJ 366; French, "The Contract/Tort Dilemma" (1982) 5 Otago LR 236; and the cases therein cited.

24 See, for example, *Osman v J Ralph Moss* [1970] 1 Lloyd's Rep 313; *Cherry Ltd v Allied Insurances Brokers Ltd* [1978] 1 Lloyd's Rep 274.

25 See, for example, *McNealy v Pennine Ins Co Ltd* [1978] 2 Lloyds Rep 18; [1978] RTR 285 (CA); failure to warn insured of unaccepted categories of motorist. In *Norwest Refrigeration Services Pty Ltd v Bain Dawes (WA) Pty Ltd and Geraldton Fishermen's Co-Operative Ltd* (1983) 2 ANZ Insurance Cases No 60-507 the Full Court of the Supreme Court of Western Australia saw the lack of direct consultation and instruction by a client as relieving a broker from a duty to draw certain exclusion clauses in a policy to the attention of an insured.

26 Per Woodhouse P and Sir Thaddeus McCarthy; McMullin J dissenting on the basis that the assessor had undertaken reasonable enquiries and had satisfied the standard of care one would expect of a skilled assessor.

27 See, for example, *Ernest Harding Niemann Pty Ltd v Heartsview Ins (Australia) Ltd; Re Palmdale Ins Co Ltd (In Liq)* [1982] VR 921 (Vic Sup Ct); *Norwich Winterthur Ins (Australia) Ltd v Con-Stan Industries of Australia Pty Ltd* [1983] 1 NSWLR 461; (1983) 2 ANZ Insurance Cases No 60-513 (NSW Court of Appeal); *Evans and Lyford v Monadelphous Corpn Pty Ltd and Lombard Ins Co Ltd* (1983) 2 ANZ Insurance Cases No 60-512 (WA Sup Ct).

28 See Marine Insurance Act 1906 (UK), s 53; Marine Insurance Act 1908 (NZ), s 53; Marine Insurance Act 1909 (Cth), s 59; *Evans and Lyford v Monadelphous Corpn Pty Ltd and Lombard Ins Co Ltd*, supra.

29 *Insurance Law in Australia and New Zealand (1980)* at 181.

30 See the comments of Sutton, op cit, 181.

31 See Hutley JA, at 77, 915; Glass JA, at 77, 920, and; Mahoney JA, at 77, 925. See also *Majeau Carrying Co Pty Ltd v Coastal Rutile Ltd* (1972-1973) 129 CLR 48, 61.

32 See also *Ernest Harding Niemann Pty Ltd v Heartsview Ins (Australia) Pty Ltd; Re Palmdale Ins Ltd (In Liq)* [1982] VR 921 (Supreme Ct of Victoria).

33 Glass JA cites also the cases of *Heimann v Commonwealth of Australia* (1938) 38 SR (NSW) 691, at 695 (per Jordan CJ) and *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 16 ALR 363; (1978) 52 ALJR 20, 26 (per Lord Simon of Glaisdale) in support of his summary of the relevant legal principles.

34 For example, the General Insurance Brokers and Agents Act 1981 (Western Australia), s 16, requires that every broker maintain an insurance broking account into which must be paid all sums received by the broker in the course of his broking operations, including premiums. The Australian Law Reform Commission in their *Report on Insurance Agents and Brokers* (1980), para 105, recommends that all insurance broking moneys should be placed in a separate bank account and the investments made from these accounts should be restricted. See, for example, *Re Kayford Ltd* [1975] 1 WLR 279; [1975] 1 All ER 604 (protection afforded where money paid into account designated as creditor's trust account).

35 See the Australian Law Reform Commission, *Report on Insurance Agents and Brokers* (1980) at para 99.

Overseas Correspondence

PLAY IT AGAIN, SONY

By Gray Williams, from Wisconsin USA

Since this piece was written towards the end of 1983 the Supreme Court of the United States has handed down its decision by the narrowest of margins of 5 to 4. In effect the majority agreed with the last sentence of Mr William's prophecy. The article, although overtaken by events provides useful and interesting background to the case.

A presidential candidate once called for "a chicken in every pot" and while no-one yet has suggested that every American home should have a videotape recorder, these machines, as their cost has decreased, have become more and more popular. But there is a price for such consumerism and Universal Studios Inc, and Walt Disney Productions are trying now to find what that price is, and who should pay it. The case that may finally decide some of these questions is popularly called the *Betamax* case *Universal City Studios Inc v Sony Corporation of America* 659 F 2d 963(1981), and the facts surrounding the case are well-known. Sony Corporation manufacturers videotape recorders (VTRs) and videotapes which are sold widely throughout the US. The machines and tapes are used by private consumers to videotape television programmes and they were advertised as being for that purpose. Universal Studios and Walt Disney were copyright owners and producers who claimed that the use of VTRs violated the copyright laws. While they did not claim that Sony infringed the copyright laws – if there was an infringement it was done by the consumers – they argued that Sony was liable as a contributory infringer.

The case was first heard by the US District Court in California and at issue were the following questions: first, is videotaping of copyrighted material in one's home and for non-commercial use, a copyright infringement; second, if there is a copyright infringement does it fall within "fair use" (fair use is a privilege given to non-owners of copyright material to use the material without infringing copyright laws); third, if there is an infringement and it is not fair use, can Sony be held liable for copyright infringements committed by VTR owners; and four, if Sony is liable, what relief can be granted?

The Court ruled for Sony holding that copyright owners did not get monopoly rights over videotaping when done by the owners of VTRs in their homes for private, non-commercial use. And, said the Court, even if there was copyright infringement, Sony would not be held liable under the theory of contributory infringement. Finally, even if Sony was liable, injunctive relief would not lie because there was no unfair competition. The decision, well reasoned and clear-cut, was very much the opposite of what Universal and Disney Studios had wanted to hear. They appealed to the United States Court of Appeals, Ninth Circuit. That Court, also in a well reasoned and clear-cut decision, reversed the lower Court.

The Court of Appeals looked first at the 1976 Copyright Act and held that Congress, in passing that Act, had not intended to create an exemption from the law for home audiovisual recordings. The Court distinguished sound recordings – no-one is challenging the manufacturers of audio tape recorders – and stated that home audio tape recordings were exempted from copyright law. But where videotapes are concerned, the mere fact that recordings are made at home for private, non-commercial use is irrelevant; such recordings infringe the copyright laws.

The Court turned next to the doctrine of fair use. This is a statutory exception to the copyright laws and allows the use of copyrighted material for such purposes as criticism, comment and news reporting. In determining whether the use is fair, among the factors involved are: the purpose of the use (commercial, non-profit, educational); the nature of the copyrighted work; the amount of the portion used in relation to the work as a whole; the effect of the use upon the potential market for the work. Fair use traditionally involved the use by a second author of a first author's work, and not, as in the present case, the reproduction of an entire work to use it for its intrinsic purpose, (ie to use it for its ordinary use).

The factors outlined above also, in the Court's view, were against Sony's claim. The "purpose" allowed under fair use normally involves research or criticism and while here the purpose was non-commercial, it didn't fit within the traditional purpose rationale. As far as the second factor was concerned – the nature of the work – generally fair use had been allowed when informational works were involved, clearly not the case here. The third factor – the amount of the reproduction – was very much against Sony's claim as the whole work was being reproduced. The Court felt that it did not

36 "Agency: Theory and Practice (1978) 94 LQR 224, at 238. See also Fridman, "The Abuse and Inconsistent Use of Agency" (1982) 20 U Western Ontario LR 23.

37 See the excellent article by French, "The Contract/Tort Dilemma" (1982) 5 Otago LR 236 and the cases there cited; see also *Port v New Zealand Dairy Board* [1982] 2 NZLR 282.

38 See, for example, the Insurance Act 1960-1976 (Queensland); Insurance Brokers' (Registration) Act 1977 (United Kingdom); General Insurance Brokers and Agents Act 1981 (Western Australia); and see the provisions of the Insurance (Agents and Brokers) Bill 1983 (Cth) introduced in Federal Parliament on 7 December 1983.

39 Twenty-seven brokerage firms collapsed in Australia during the period 1970-1979, rendering total losses of over $7 million. See the Australian Law Reform Commission, *Report on Insurance Agents and Brokers* (1980) para 104.

40 See, for example, the Corporation of Insurance Brokers of New Zealand Code of Conduct.

need to reach a decision on the fourth factor – the market effect – but it indicated that the question here is not whether plaintiff can prove a degree of harm, (an exceptionally difficult task), but whether there is a tendency to "prejudice the potential sales of a work".

Thus there have been copyright infringements, fair use is not involved, and the questions now for the Court is whether Sony can be held liable for the infringements. The Court had no trouble with this issue: Sony, they said, knew that their product would be used to reproduce copyrighted works, in fact that is one of the few things VTRs can be used for and they were advertised and sold expressly for that purpose. Therefore, Sony sold VTRs with the knowledge of the likelihood of copyright infringements and had "contributed to the infringing conduct of another". As far as the relief is concerned, the Court admitted the complexity of the issue but suggested that, as actual proof of damages is difficult in these cases, statutory damages may be appropriate. Injunctive relief is also a possibility, or damages, or a continuing royalty. They remanded the case to the lower Court to fashion some form of appropriate relief.

The Court of Appeals reached this decision on 19 October 1981 and denied a rehearing on 12 January 1982. Sony appealed to the US Supreme Court seeking to have the question resolved once and for all. But if the waters were a little murky then, they now have become downright muddy. In June 1982, the US Supreme Court agreed to hear the case, briefs were filed in October and there were oral arguments in January 1983. A decision was expected in June 1983, but instead, in a highly unusual step, the Court announced that the case would be set over for reargument. On 10 October 1983, oral arguments were again presented and, as one commentator pointed out, there was something touchingly appropriate in this: the same lawyers, arguing the same case, in front of the same Court that had heard it all nine months before, it was, well, just a little like watching a videotape recording.

The questions directed at the attorneys and the oral arguments at the October Supreme Court hearing perhaps may indicate which way the Court is leaning. Sony's attorney agreed with Justice O'Connor that fair use and direct infringement questions need not be resolved if Sony was not a contributory infringer. And, as Sony's attorney pointed out, MCA Corporation, the parent company of Universal and Disney, had its highest earnings recently despite there being 3.5 million Betamax recorders in the US. The movie industry therefore has hardly been ruined by VTRs, (the Court where the case was first heard had found no present damages).

On the fair use issue Universal's attorney argued that the doctrine is narrow and is intended to cover where one author builds on the works of another, Sony countered that technological advances (such as VTRs) should not be halted by copyright owners. But besides having to grapple with these legal issues, the Court is aware that a very real problem of relief exists if they should rule for Universal (especially when there has been no showing that Sony's actions have caused economic harm to Universal). The Ninth Circuit Court's suggestions of injunctive relief or damages or royalties may simply be impossible to enforce fairly (how for example, would a Court treat a consumer who buys a VTR but does not intend to record copyrighted material with it). I suspect therefore, that the Supreme Court may rule for Sony but on the narrowest possible grounds, if for no other reason than that advanced by Sony's attorney, namely, why should a person who wants to watch a Monday night television programme on Tuesday morning have to pay for the privilege of doing so.

Lawmaking and Judges

In a paper delivered at the 1930 Legal Conference Mr J B Callan, later a Judge of the Supreme Court, remarked in passing on the question of Judge-made law. With current discussion on the possibilities of abolishing appeals to the Privy Council and of enacting a Bill of Rights what he had to say with his customary clarity deserves to be recalled. The original text will be found at (1930) 6 NZLJ 97.

Much of the law under which all civilised communities live is made by Judges. This is a hard saying. Those who believe that the people really make all the laws under which they live will deny it. Those who believe there should be no law save that to which the people voluntarily submit themselves will say: "Let us have no more Judge-made law." But such an ambition cannot be realised. In a real democracy no law can long prevail which is contrary to the active wishes of a substantial majority. No greater measure of popular control than this can be expected. Meanwhile community life must be carried on by imperfect human beings, who, because they are imperfect, continually involve themselves in disputes, which they will not or cannot settle. The ingenuity of man as an evader of law has always been greater than his foresight as a law maker. The interests of the evader are more vitally affected than those of the law maker. He gives more time and attention to his business and he works under conditions more favourable to results. Moreover, since conditions of life are always changing, new situations not precisely foreseen are always arising. For these reasons it continually happens that citizens bring before the Courts disputes on which there is no clear definite rule. The democracy, through its Parliament, has either not spoken at all, or has spoken ambiguously. Yet the dispute must be settled, and the Court must settle it. In the result, the Judges make law; and that law, once made, stands until unmade by higher authority. Of course, Judges do not purport to make law, but only to interpret. But in its practical effect such interpretation is new and Judge-made law. It gives the citizens new rules of conduct which are new, because previously unknown. And it is Judge-made by this very sure test, that it is made by one particular Judge or group of Judges in cases as to which Judges may well differ, often in cases as to which they have very patently differed. Law is a living thing, and therefore, like all living things subject to change and development. What shape this inevitable development will take depends in part on the individuals who are charged with administering the law – the Judges. This aspect of the work of a Judge is controlled by any Court of Appeal to which he is subject. Change the Court of Appeal, and you must change the development. Whether for better or for worse, I do not consider. □

Unreported Cases: Myth and Reality

By Nicolas Harrison, BA

This article is reprinted with permission from the English publication The Law Society's Gazette *of 1 February 1984. The author who is a Barrister, is Managing Director of Butterworth (Telepublishing) Ltd. As such he is responsible for the LEXIS database. The point at issue of course is of great relevance in New Zealand because there is necessarily a restricted number of cases reported in full, even allowing for the more recent growth in the number of specialist report series. Most Court of Appeal and High Court judgments are noted in* Current Law, *and the citation of recent unreported judgments is therefore not uncommon. An editorial comment by Martin Fine on the* Roberts *and* Stanley *cases appeared at [1983] NZLJ 93; and a lengthy article on the possibilities of a computerised legal information retrieval system (CLIRS) for New Zealand was published at [1983] NZLJ 279.*

Lord Diplock's remarks in *Roberts Petroleum Ltd v Bernard Kenny Ltd* [1983] 2 AC 192 at 200-202 have given rise to considerable discussion, and some uninformed comment, on the citation in argument by counsel of unreported cases which are accessible only through a computer-based legal research service.

The danger is that the statement of Lord Diplock, and the earlier comments of Sir John Donaldson MR, on this topic have given rise to a myth which, for want of contradiction, is liable to establish itself as accepted truth. That myth was given expression in the following passage in an article by Dr Roderick Munday ("The Limits of Citation Determined") in [1983] *Gazette*, 25 May, 1338:

> This year, too, the Courts have expressed concern at the vast quantity of authority sometimes cited before them. Although this trend was already apparent long before the advent of electronic data-processing appliances, there can be no doubting that such machines have exacerbated the problem. As Sir John Donaldson MR recently warned in the Court of Appeal, if cases which decide no new law are solemnly recorded in data retrieval systems, there is the evident danger that future generations of High Court Judges will be simply bombarded with such decisions by the Bar. Counsel, therefore, were urged to exercise a proper discretion in the use they made of unreported cases (*Stanley v International Harvester Co of Great Britain Ltd* [1983] *The Times*, 7 February).

The Court of Appeal merely expressed the hope that counsel would display suitable restraint in the citation of precedent. The House of Lords, however, a matter of days after the *Stanley* decision, went a step further and, in effect, has now forbidden the citation of unreported decisions before it. In *Roberts Petroleum Ltd v Bernard Kenny Ltd* [1983] 1 All ER 564, the House of Lords finally lost patience with counsel who unnecessarily introduce citation into their arguments surplus to requirements. Fittingly, Lord Diplock delivered the leading speech; but the other four members of the House agreed with his remarks.

The House had been referred in argument to two unreported Court of Appeal decisions which in their Lordships' view, settled no principle of law that was not already to be found in the reported cases, and which served only to lengthen the case.

The suggestion that the storage of unreported cases on "electronic data processing appliances" such as Lexis has resulted in the Courts in general and the House of Lords in particular being deluged by the citation of irrelevant decisions is an exaggeration of the truth verging on falsity. This is evident from an examination of the two cases in question.

Despite the contrary impression given by the wording of *The Times* Law Report (stating that Sir John Donaldson MR has "expressed concern about the indiscriminate citing of computer-recorded cases which contained no new law), no unreported cases were cited to the Court of Appeal in the *Stanley* case. Sir John's comments, given wide publicity by *The Times*, bore no relationship to anything which had arisen in that case.

House of Lords

In the *Roberts Petroleum* case Lord Diplock ([1983] 2 AC at 201), having referred to the fact that, since April 1951, transcripts of judgments of the Court of Appeal had been stored in the Bar Library and, since 1978, the Supreme Court Library, and having noted parenthetically that "unreported judgments which have been delivered since the beginning of 1980 are now also included in the computerised database known as Lexis", continued:

> Two such transcripts are referred to in the judgment of the Court of Appeal in the instant case. One of these was a case, *Hudson's Concrete Products Ltd v DB Evans (Bilston) Ltd* . . . which had been the subject of a note in the *Solicitors' Journal* (1961) 105 SJ

> 281. The other had not been noted in any professional journal, nor had either of the two additional transcripts to which your Lordships were referred at the hearing in this House.

As the quoted passage indicates, the House was referred to four "unreported" Court of Appeal decisions (not two). From the list of cited cases given in the law reports ([1983] 2 AC at 194) it appears that the four cases were *Hudson's Concrete Products Ltd v DB Evans (Bilston) Ltd* (1961) 105 SJ 281; *Glass (Cardiff) Ltd v Jardean Properties Ltd* (1976) 120 SJ 167; *Prestige Publications Ltd v Chelsea Football and Athletic Co Ltd* (1978) 122 SJ 436, and *Whitbread Flowers Ltd v Thurston* (17 May 1978).

Lord Diplock is incorrect in stating that only one of the four cases had been "noted in any professional journal", in fact, three of them had been noted in the *Solicitors' Journal,* as the citations given above indicate, and the fourth, the *Whitbread Flowers* case, is summarised in *Current Law* (see [1979] CLY 70). Furthermore, the first three cases are cited in the title "Execution" (the title relevant to the *Roberts Petroleum* case) in *Halsbury's Laws* (4 ed, Vol 17, paras 539, 550 and supplement to para 452).

What is apparent is that not one of these four cases had been retrieved from a "computerised database", certainly not from Lexis, if only for the reason that none of them had been included in such a database in the first place; all of them were pre-1980 decisions. Undoubtedly the reason, directly or indirectly, why they had come to the attention of counsel was because they had been summarised as cases of some special interest and value by the publications referred to.

It might be added that the tone of Dr Munday's comments, quoted above, could be considered somewhat offensive to the very experienced counsel who argued the *Roberts Petroleum* case before the House. As Lord Diplock acknowledged, two of the four cases (the *Hudson's Concrete* and the *Glass* cases) had been referred to in the judgment of the Court of Appeal ([1982] 1 All ER 685). The Court of Appeal was presided over by Lord Brandon of Oakbrook who delivered the judgment of the Court. No adverse comment was made on the citation of the unreported cases; in fact in his judgment ([1982] 1 All ER at 691f) Lord Brandon said:

> Further light on this aspect of the case is thrown by the observations of the members of the Court in *Glass (Cardiff) Ltd v Jardean Properties Ltd* . . .,

and he then proceeded to quote at some length passages from the judgment of Lord Denning MR in the *Glass* case.

It is true that in *Roberts Petroleum,* the House of Lords reversed the Court of Appeal, but in the circumstances it would hardly be unreasonable for counsel for the respondents, in seeking to support the Court of Appeal judgment, to rely on the two unreported cases referred to by the Court. (In fact, according to the report counsel for the unsuccessful respondents cited only one of the four cases, the *Glass* case; it was counsel for the successful appellants who cited all four.) The fact that Lord Diplock found the cases of "no assistance" may be attributable to the different view of the law which he took from the Court of Appeal. In addition to the four unreported cases, another 17 reported cases were cited in argument before the House; of these, nine were not referred to in their Lordships' speeches and it may be that these were of no assistance either. In fact, Lord Brightman, who in effect delivered the judgment of the House on the main issue in the *Roberts Petroleum* case, considered in some detail four cases which were in point, starting with the unreported *Hudson's Concrete* case (see [1983] 1 All ER at 573, 574).

The Court of Appeal judgment in the *Roberts Petroleum* case was not the first occasion on which the two earlier "unreported" cases had been cited. The *Glass* case had previously been referred to by Sheen J in his judgment in *The Silia* [1981] 2 Lloyd's Rep 534 and by the Court of Appeal in *Burston Finance Ltd v Godfrey* [1976] 2 All ER 976. The *Hudson's Concrete* case was referred to in three earlier reported Court of Appeal decisions, *Burston Finance Ltd v Godfrey* (supra), *Rainbow v Moorgate Properties Ltd* [1975] 2 All ER 821 and *D Wilson (Birmingham) Ltd v Metropolitan Property Developments Ltd* [1975] 2 All ER 814.

An examination of the background to Lord Diplock's comments is revealing, not merely because it demonstrates that there was no question of their Lordships being bombarded with unreported cases retrieved from a "computerised database", but also to illustrate the difficulties which Lord Diplock's ruling concerning the citation of unreported cases is likely to impose on counsel.

The limitations of law reporting

The ruling has, in Francis Bennion's words (*New Law Journal,* 30 September 1983, p 874), been greeted by a "unanimous chorus of criticism". The arbitrary nature of the ruling, so far as it relates to the citation of cases before the House, has been cogently demonstrated by Mr G W Bartholemew ("Unreported Judgments in the House of Lords", *New Law Journal,* 2 September 1983, p 781).

The question to which this article is addressed is whether the inclusion of a large volume of otherwise unreported cases on an online database such as Lexis will in fact mean that "English Courts may find themselves unable to cope with the volume of precedent upon which counsel and Judge may, and will, make call" (Munday, loc cit).

Statements of this kind reveal a fundamental misconception as to how full text online research services operate, the apparent assumption being that they simply mirror established research techniques using printed materials.

Historically, the practice of English law reporting has been to concentrate on limiting published cases to those which clearly settle, or at least were thought to settle, points of legal principle. There are a number of reasons which account for this approach, the most fundamental being the economics of traditional "print on paper" publishing. Currently the "general" series of law reports (the Law Reports, Weekly Law Reports, and All England Law Reports) report something between 300 and 400 cases each year. If one adds the various "specialised" series of "full" reports, such as Lloyd's Reports, Criminal Appeal Reports, Tax Cases, etc, the number of reported cases would be at least double.

The problems with the traditional

law reporting methods are (a) selectivity and (b) volume. Too many cases are reported for lawyers easily to keep abreast of all new developments in the law, and too many to be easily and efficiently indexed by manual methods. On the other hand, because a law report, to be of value must contain the full and unedited texts of the judgment, or judgments, delivered in the case, which will often run to considerable length, the economics of publishing mean that only a small proportion of judgments find their way into print.

Contrary to what is supposed, there is no hard and fast line which can be drawn between cases which, in Lord Diplock's words, establish "some principle of law", on the one hand and the rest which, as Sir John Donaldson puts it, "decide no question of law whatever but merely apply very well known principles of law to the particular facts" (*Stanley v International Harvester Co of Great Britain Ltd*).

As Mr Bartholemew points out (loc cit):

> The fact that a so-called principle of law applies in this situation rather than that, is in fact part and parcel of the principle itself. The fact that a so-called principle is phrased in one way rather than another – something which Lord Diplock tended to dismiss as a "mere choice of phraseology" – is not separable from the principle itself. To paraphrase Wittgenstein: the principle is its statement. Counsel must surely be allowed to mount their arguments not only in terms of what the so-called principles of law are, but also in terms of the circumstances in which they have been applied, and the way in which they have been phrased, and this must surely be so whether the judgment to which reference is made was reported or not.

In mounting an argument, counsel at least has the advantage of hindsight; that is to say he is able to make a judgment about the relevance of an earlier case, and its significance, in the light of an actual problem with which he is confronted. A law reporter or editor, when selecting the cases which should be reported, has no such advantage. At the time of selection it is impossible to foresee all the circumstances that might arise in the future, and the ultimate significance which any particular judicial decision may have in the light of such unforeseeable circumstances.

The result of this, as Colin Tapper has pointed out ([1983] *Gazette*, 29 June, 1636), is that we "report in full a very small proportion of cases, and select this proportion in a highly idiosyncratic way". In consequence, aware of the deficiencies of conventional law reports, publishers supplement them with "a welter of edited and summarised versions of further cases", summaries which are often misleading. This is not necessarily the fault of the editors or reporters who prepare these summarised versions. it is usually impossible to reduce a full judgment into a paragraph without losing much of the value of the original. Classified digests, such as *Current Law*, do provide an invaluable service to the profession, to the extent that they provide an index to cases that are fully reported elsewhere. The value of such a publication is that it affords a relatively quick means of indicating either that a case is clearly irrelevant and need not be referred to, or conversely that it may be relevant in which case a reference to the source is provided.

As Mr Tapper points out, it is of the utmost importance to lawyers that they "should be able to refer to original materials as flexibly as possible, with the minimum of constraint upon method of access". "Access" implies not merely physical access to the original sources, but the most efficient and rapid method of identifying those sources in the first place. Traditionally, publishers have provided a variety of means, in the shape of textbooks, indexes, digests and publications such as *Current Law* to accomplish this end.

The benefit of a full text research system such as Lexis is that it is able to provide the required access to original sources, in both senses, far more efficiently and rapidly than can be achieved by traditional methods. To quote Tapper (loc cit):

> It provides comprehensive coverage in clearly defined areas. Its coverage is as authenthic as the words of the Judges themselves, because it never contains less than the full and unedited text of those words. It allows the lawyer virtually complete freedom of access.

Selectivity

In discussing the use of unreported material in computerised legal information systems, David Worlock, in his article "Case Law on Computer and the Debate on Unreported Cases", *Computers and Law*, November 1983, p 12, seeks to draw a distinction between "selectivity, headnoting and digesting on the one hand, and the automatic inclusion of full text transcripts of superior Court cases without headnotes or an editorial consideration of value on the other". The danger is, so the argument runs, that the indiscriminate loading of databases with large volumes of unedited full text transcripts, will have the effect that "computerised services will become clouded by the proliferation of unwanted data". This is because:

> mere storage capacity is not the computer's biggest asset. More important is the speed and efficiency with which relevant data can be extracted and put to good use.

There are two logically distinct, but related, points contained in this argument. The first relates to the storage capacity and speed of searching of the computer system on which the database is stored and the second relates to the form, and scope, of the materials which constitute the database.

With regard to the first, it may or may not be true that "the speed and efficiency with which relevant data can be extracted" from the computer is more important than "mere storage capacity". This is not a sensible comparison. Both elements are not merely important, but essential requirements of an online database system. It is true that the greater the storage capacity the more difficult it becomes to ensure the speed and efficiency of the retrieval process. But this is simply a question of scale. What is required is a computer system which (*a*) has sufficient capacity to store all potentially relevant material in the database, and (*b*) affords the facility for searching and retrieval of relevant items from the database with sufficient "speed and efficiency" to be acceptable to the user – and if we are talking of lawyers that implies a very high standard of speed and efficiency indeed.

The use of the phrase "potentially relevant material" brings us to the

second point. This in turn covers two distinct but related elements: (*a*) coverage and selectivity on the one hand, and (*b*) the form in which the material is stored on the other.

> The form in which information is presented, writes Mr Worlock, is also therefore, extremely important. As with *Current Law*, headnotes, abstracts and summaries are useful devices to highlight the most pertinent facts of a case. The alternative is to provide case transcripts, regardless of whether a full text is needed, which requires the user to read through every line to find the relevant points of interest.

That passage would, with one qualification, be perfectly fair comment if applied to traditional "print on paper" publishing, since indexes, digests, abstracts, etc, are essential devices to lead one to "relevant points" and this is precisely because with printed material there is no other alternative to reading through every line of the original text.

It makes no sense, however, when applied to computer-based full text research systems. The whole point of such a system is that, because it is capable of searching at enormous speed through the full texts of original source materials for the occurrence of particular words or combinations of words, it enables the lawer to dispense with the paraphernalia of digests, indexes, etc, for the purpose of tracking down relevant points.

Similar considerations are relevant to the question of selectivity and coverage. Hitherto, the economics of the traditional publishing process have imposed limitations on the case law material which could be preserved in the form of published law reports. This meant that, in selecting cases for reporting, editors and law reporters had to make a judgment as to the value of such cases as precedents in circumstances which might occur in the future and which, for the most part, could not have been anticipated.

Computerised research

A full text computerised legal research service is therefore able to do two things: (1) it can store a much wider range of material than was possible in printed form, and (2) because it can provide direct and rapid access to the original source texts it avoids the necessity for headnotes or summaries, whether as additions to, or in substitution for, the full text of the original case itself. This is not to say that, where they exist, headnotes do not constitute a useful embellishment to the original text in a computer based system, but they are no more than an embellishment, whereas in the printed law reports they are a necessity if the reports are to be usable in any practical sense.

What is certain is that a headnote or summary can never be an adequate substitute for the original document whether on a computer database or in printed form. The contrary view must be based on a misunderstanding of the role of judicial decisions as a source of law. To rely on a case as an authority an advocate must have access to the actual words of the Judge. Any edited version of those words is liable to be no more than a partial expression of the principle for which the case is authority – and may well be something much less adequate than that.

To revert to the original question, is it the case that the storage of large volumes of "unwanted data" in the shape of unreported cases is likely to result in the courts being "bombarded" with decisions containing "no new law"? Despite suggestions to the contrary, there is absolutely no evidence that this has occurred so far.

The use of the expression "unwanted data" or "unwanted material" (see Worlock, loc cit) serves only to confuse the issue. In relation to any specific issue, most cases on a database, whether reported or unreported, will be "unwanted"; the whole point of a computerised legal research service is to enable the lawyer to determine, in any given circumstances, what items in the database are "wanted" for his particular purpose. It is not possible to determine in advance what material is "wanted" or "unwanted" in circumstances which cannot be foreseen by the person making the selection.

Counsel's role

The collection of unreported cases, in addition to the reported cases, on the Lexis database will continue to grow during the years to come. The fear which has been expressed that this is likely to lead to an increase in the citation of irrelevant unreported cases is understandable but, it is submitted, wholly misplaced. On the contrary it is arguable (even if we disregard the assumption that an unreported case is more likely to be irrelevant than a reported one) that the contrary will be the case. The point has been admirably and succinctly made by David Andrews (*Solicitors' Journal*, 4 March 1983, p 157):

> The effect of electronic retrieval of the sources of the law, rather than leading to the citing of an excessive number of, or irrelevant, authorities to the Bench should, if counsel are doing their job properly, namely exercising their judgment as to what is and what is not relevant in any particular set of circumstances, result in the citing of possibly fewer but certainly more relevant authorities than has hitherto been possible. Surely a principal art of the advocate is his skill in selecting his authorities: that has always been so and will not be changed by technology.

The essential qualification is that counsel should be "doing their job properly". In the final analysis it is for counsel to determine what cases are relevant to the argument he wishes to put to the Court on behalf of his client. They will be relevant only to the extent that they enunciate some principle of law, or a qualification of such a principle that will lend support to the argument put forward. The fact that a case has been reported cannot itself be a criterion of relevance in this sense. At best it is merely an indication that the case does enunciate a principle of law of some importance.

The value of an online database service which contains a comprehensive collection of case law, reported and unreported, is that, by employing the scanning and retrieval facilities which such a service offers, the lawyer is able to make his own judgment as to what is relevant, and is not compelled to rely in large part on the judgment of a third party, in the shape of an editor or law reporter.

It may be the case that there has been a tendency for counsel to cite too many and irrelevant authorities before the House and elsewhere. There is, of course, a temptation, in deciding what to cite, to play safe and leave no stone unturned. If counsel have a tendency to cite irrelevant cases, they already

Saluting the flag

The recent announcement by the Minister of Education that he proposed to require that the flag be honoured in every school on every day makes it appropriate to recall an article at [1974] NZLJ 25 by D F Dugdale deploring, with his customary verve and his usual satirical style, "a widespread failure to comply with the provisions of The Ceremony of Honouring the Flag Regulations (SR 1941/209)." *Readers may well find the two following extracts of interest.*

And is it really satisfactory that the regulations should fail to specify the precise details of the ceremony? In matters of law reform it is often useful to look to the experience of other parts of the Commonwealth. In *Ruman v Board of Trustees of Lethbridge School District* [1944] 1 DLR 360 the Alberta Supreme Court upheld the validity of a school rule pursuant to which "the children assembled in the lower hallway and sang "God Save the King", then the principal gave the command "Salute the Flag by numbers" and as he said "one" the children came to attention and saluted the flag with a military salute. On the command of "two" they dropped their hands to their sides. It is a pretty picture. My suggestion (and I am anxious to be constructive) is that a committee should be set up comprising the Dominion President of the Returned Services Association, the Chairman of the Arts Council, the Gentleman Usher of the Black Rod, a representative of the Maori Council and the President of the Federation of Labour. Such a committee should be able without difficulty to devise a ceremony combining patriotism, aesthetic appeal, dignity, a recognition of the validity of Polynesian cultural achievements and respect for the rights of the workers. . . .

Here at last (or so it seems to me) is a role for Brigadier Gilbert's security service which should forthwith stop doing whatever it is it does now. Instead it should be charged with the enforcement of the Ceremony of Honouring the Flag Regulations and those provisions of s 186 of the Education Act which relate to the inculcation of patriotism. It is difficult to imagine a task that that no doubt splendid body of men is better equipped to perform.

I know that it is fashionable for the intellectuals, the long-haired lefties and all that rabble to sneer at notions of patriotism and honour. But every man, woman and child in New Zealand should be constantly reminded of the fact (unpalatable though it no doubt is) that the world is full of foreigners. It is up to the Government to do something about it. □

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have plenty of opportunity to do this without having recourse to unreported cases.

Matter for judgment

In the last analysis, it must be a matter for the judgment of counsel as to what cases should be cited to the Court in support of his argument, and that must be part and parcel of the judgment which he makes as to the appropriate argument to mount on behalf of his client. In the nature of things, his judgment will not always be right, nor be one which accords with the view of the law taken by the Court. It is just likely that there will be a difference of views as to whether the cases cited enunciate any principle of law relevant to the issue before the Court.

Clearly, there can be no objection to the Courts issuing a warning in general terms against the over-citation of cases if this is in fact a problem, and it would be perfectly proper for the Court to issue a rebuke in particular instances where this occurs. The restriction which the House of Lords has sought to impose is, however objectionable in principle and unsound in logic. It is further objectionable because of the arbitrary distinction which it draws between reported and unreported cases. The capricious nature of this ruling is illustrated by the fact that many leading cases remain "unreported" for months after the date of decision. During that period leave to cite them to the House must be obtained. Once they have appeared in a law report, whether published by the Incorporated Council or by a commercial publisher, counsel is free to cite them without leave even though they contain no statement of any "principle of law, relevant to an issue in the appeal". Furthermore, how does one define "reported" in this context? Are cases reported in *The Times,* the *Estates Gazette, The Law Society's Gazette* or the *Solicitors' Journal* "reported" or "unreported" cases for this purpose? Indeed, this question has already given rise in the House of Lords to a new classification: "virtually unreported" cases (see Lord Roskill in *Export Credits Guarantee Department v Universal Oil Products Co* [1983] 2 All ER 205 at 224e with reference to a case reported in the *Solicitors' Journal*).

Contrary to principle

As Francis Bennion has observed ([1983] *Gazette*, 29 June, 1635), the House of Lords' ruling is "contrary to principle" since:

> No extra authority is conferred on any judicial decision by the fact that a law reporter has chosen to include it in his reports. Unreported cases have equal authority with reported cases, and therefore should be equally accepted in citation. . . . True the Court should not be overwhelmed by unnecessary citations. The right of counsel to cite any authority he thinks fit is a vital one, however, and needs to be insisted on by the Bar.

The ruling is objectionable in principle, not least because it is founded on the assumption that counsel cannot be relied on to do their job properly without some arbitrary restriction being placed on the authorities to which they can have recourse for the purpose of supporting a legal argument. The onus is, of course, on counsel to select their authorities with care and skill. The new computer-assisted legal research services available to them constitute extremely useful devices to serve that end. □