THE NEW ZEALAND
LAW JOURNAL
21 OCTOBER 1984

Professional responsibilities

It is generally agreed that they do things differently in Australia. Whether for better or for worse depends of course on how you might be affected by the particular activity. The legal profession in Australia has its own unique features of organisation (in some states it is a fused profession and in some it is not), attitude (in NSW the Law Society is reported in *Justinian* No 33, to have set aside $500,000 to fight the government on the no-fault compensation war) and finance (one Sydney firm is reported to have made a profit of $A8 million). They also seem to become involved more readily than New Zealand practitioners in Court cases.

There is a *cause celebre* at the moment. On the face of it it is a case for breach of contract. But the solicitors for the plaintiff Tectron Corporation Pty Ltd are at risk. An application has been made to join all the partners of the firm, and the instructed barrister, as parties in a cross-claim by the defendants alleging conspiracy to abuse the processes of the Court and defraud the defendant.

In the meantime an order has been made prohibiting publication of name of the legal firm. If the application has been made *in terrorem* it would certainly seem to have had some effect, at least in frightening the solicitors into obtaining the order prohibiting publication of their names. If this sort of thing goes on then it would seem that solicitors might have to conduct their own hearing of the case of a prospective plaintiff to satisfy themselves of its *bona fides* before agreeing to act.

The situation in New Zealand would now seem to be covered by the decision of the Court of Appeal last year in *New Zealand Social Credit Political League v O'Brien* [1984] 1 NZLR 84. In that case it was alleged, as one of the two causes of action, that a solicitor had drawn and issued a statement of claim in breach of public duty, without a sufficient basis and without reasonable cause. This statement of claim was in an action for accounts against Mr O'Brien and others. At first instance Jeffries J declined to dismiss either of the two causes of action. The first cause of action – malicious prosecution – was rejected by the Court of Appeal as being in the circumstances an abuse of process.

It is the second cause of action, of an alleged breach of professional duty, that is of particular interest to lawyers. The *Haddow* and *Gartside* cases on liability of solicitors were mentioned in the judgment of Cooke J, and have been analysed at length in the two articles on solicitor's liability by A M Dugdale appearing at [1984] NZLJ 316 and 336.

The pleading of the second cause of action was expressed to be that the solicitor for the League drew and issued a statement of claim in breach of public duty, without a sufficient basis and without reasonable cause; and that the League authorised and ratified what was done. Authority for this cause of action was apparently pleaded in the statement of claim as the *Wellington District Law Society* case [1976] 1 NZLR 452. That case, it will be recalled, was an appeal against a charge of professional misconduct laid by the Wellington District Law Society on the basis that a practitioner had included certain allegations in a statement of claim without having reasonable grounds upon which to put them forward. The Court dismissed the appeal on the ground that while counsel has a duty to his client he also has an overriding duty to the Court, to the standards of his profession, and to the public. On this basis counsel for Mr O'Brien argued that there was a triable issue.

The Court however rejected that view. Cooke J referred to the argument as an inversion of what was said in the *Wellington District Law Society* case. He said at p 87:

> The ratio of that decision and the authorities on which it was based was simply this: that the absolute privilege enjoyed by counsel, for reasons of public interest, in drawing or settling pleadings or presenting a case in Court brings with it a professional responsibility, for breach of which there is a disciplinary sanction, not to make allegations without a sufficient basis or without reasonable grounds. In other words, it is just because the law gives an immunity (from defamation actions at least) that disciplinary proceedings before the appropriate professional body are allowed. They are the proper means of enforcing the practitioner's public responsibility. To claim that this decision supports the creation of a new cause of action in the Courts is to turn the reasoning on its head.

Somers J at p 96 dealt briefly with the argument that had been advanced. He referred to the situation where an allegation is made that the statement of claim contains baseless charges and said:

> The only remedy available in such a case is professional disciplinary proceedings. A solicitor is not a public or statutory officer of the type referred to in cases about abuse of power and the pleaded cause of action is not of malicious abuse of process. That is the first cause of action. The matter pleaded in paras 13 to 17 discloses no cause of action.

Also at p 96 Casey J dealt with the point. He said that

the allegation was that the solicitor:

> acted in breach of his public duty as a solicitor in launching on behalf of the League the original proceedings for accounts. The suggestion implicit in his claim is that *Gazley v Wellington District Law Society* [1976] 1 NZLR 452 recognised a duty giving rise to a cause of action against a barrister or solicitor in these circumstances. This is untenable. As Cooke J points out, that case concerned the Law Society's power to discipline on the grounds of professional misconduct. The Full Court upheld its decision on the basis that professional privilege and immunity entail a responsibility not to make allegations without a sufficient basis or reasonable grounds, in respect of which a practitioner will be amenable to disciplinary action. The Court recognised an immunity for the very matters now put forward as the cause of action. . . .

The judgments dealt briefly with the question of the implications of the *Gartside* and *Haddow* decisions. They were given a carefully restricted application to exceptional circumstances. Casey J however noted, a little wryly perhaps, that "once a principle has been extended to exceptional situations, experience shows an inevitable tendency for it to be more widely applied". The matter was expressed by Cooke J at pp 87-88 as follows:

> This Court has recently recognised that there are exceptional cases in which a solicitor's duty of care extends beyond his own client: see *Allied Finance and Investments Ltd v Haddow & Co* [1983] NZLR 22 and *Gartside v Sheffield, Young & Ellis* [1983] NZLR 37. The first decision concerned a certificate intended to be acted on by the other party and thus carrying with it an assumption of responsibility to that party. The second concerned the position of an intended beneficiary of a person whose instructions a solicitor had negligently (so it was alleged) failed to carry out. In such a case as the second, unless a duty of care by the solicitor to the intended beneficiary is recognised there is no practical way of enforcing his responsibility. The client has died and his estate has suffered no damage from the alleged negligence. Disciplinary proceedings would be inappropriate and inadequate.
>
> The judgments of the members of the Court in both those cases stress the special features giving rise to recognition of a wider duty of care than usual. In general we should be slow, I think, to make inroads into the principle that a legal practitioner's responsibilities are owed only to his own client (in contract and, it may be, tort) and to the Court and professional bodies with disciplinary authority.

In clarifying these issues of professional responsibilities the case of *New Zealand Social Credit Political League v O'Brien* is one of considerable significance for the legal profession in New Zealand.

P J Downey

Books

Cases and Materials on Private International Law

By J H C Morris, QC, DCL (Oxon) Grays Inn, and P M North DCL (Oxon) Law Commissioner for England and Wales. Published by Butterworths (London) 1984, xxvii + 757 pp Price NZ$105.00 (hardback) NZ$71.50 (paperback).

Reviewed by Professor P R H Webb, Law Faculty, University of Auckland.

This English work is stated by the learned editors' preface to be intended primarily for those studying private international law at undergraduate or post-graduate level at English universities and polytechnics, and for those studying it for professional examinations. The editors need no introduction, for Dicey & Morris's *Conflict of Laws* and Cheshire & North's *Private International Law* and Morris's *Conflict of Laws* are all bywords in the field. One may, therefore, legitimately expect a superb case and materials book and the reviewer would say, at once and outright, that all English teachers and students will find that their expectations have been exceeded beyond measure.

It would appear that the learned doctors polled a number of law schools in order, wisely it seems to the reviewer (who did the same thing on a smaller scale a few years ago in this country), to find out what parts of the subject were included, or excluded, from their syllabus. On receipt of the relevant information, they omitted with regret (like the reviewer) negotiable instruments, bankruptcy, winding-up of companies and trusts. The editors confess that, having written or edited standard texts of their own, they have not attempted to write a substitute text book. Their hope is that the book presently under review will supplement the use of a text book. Even so, there are a number of notes on recent and/or difficult material. As in Smith & Thomas's well known contract casebook, there are included a number of searching questions "intended to make the student pause and reflect on what he has read". (And intended to stop reviewers dead in their tracks?)

One must now consider the place of this excellent work in New Zealand. It will, of course, be an invaluable guide to any New Zealander visiting an English tertiary institution who is to teach the subject. Equally, should it be obtained by a New Zealand student who proposes to study the subject at an English University after completing his New Zealand studies. The "home" teacher, however, would need to supplement the casebook in some respects and, in others, instruct his students to omit the material or read it lightly for interest's sake.

Chapter 1 deals with Domicile – and Habitual Residence, which is not

yet a connecting factor in New Zealand. The domicile cases are all "old friends". The New South Wales Domicile Act 1979 has been set out, along with the Domicile and Matrimonial Proceedings Act 1973 (UK), part 1. Chapter 2 is concerned with proof of foreign law and sets out s 4 of the Civil Evidence Act 1972 (UK), while chapter 3, wholly useful in New Zealand, contains familiar material (the *Ortiz* case included) on excluding foreign law. Chapter 4, on sovereign immunity, consists solely of relevant sections of the State Immunity Act 1978 (UK). The fifth chapter is devoted to Jurisdiction in Actions in Personam and contains RSC Orders 81 and 11 and ss 407, 412 and 437 of the Companies Act 1948 (UK) as well as a set of well-chosen illustrative cases valid for New Zealand purposes. Pages 79-127 will be very valuable to those in New Zealand studying EEC law (or comparative conflict of laws) as they deal with the Civil Jurisdiction and Judgments Act 1982 (UK). Relevant cases are included.

Jurisdiction to stay actions forms the subject matter of chapter 6, which also covers foreign jurisdiction clauses. Although the 1982 Act appears in it briefly, the chapter is sound for New Zealand consumption. Chapter 7 brings us to foreign judgments in personam and their enforcement. Much of it is excellent for local purposes, too, but there naturally had to be set out in full the Administration of Justice Act 1920 (UK) and the Foreign Judgments (Reciprocal Enforcement) Act 1933 (UK). Furthermore, several pages have had to be devoted to the Civil Jurisdiction and Judgments Act 1982 and relevant cases (pp 185-201), which will again interest the EEC specialist and the comparative lawyer. Relevant sections of the State Immunity Act 1978 (UK) and the Protection of Trading Interests Act 1980 (UK) bring the chapter to an end.

One suspects that some teachers omit Arbitration as such when teaching the conflict of laws. Perhaps when those who do (including, alas, the reviewer) read chapter 8 on that subject they will be persuaded to change their ways.

The first of the chapters on family law matters is chapter 9. It contains very familiar and locally useful materials on the formal validity of marriage, capacity to marry and on consent of parties. Polygamous marriages also figure. On p 279 there is a wrathful and righteous (and right) note about the incorrectness of the decision in *Hussain v Hussain* [1983] Fam 26 (CA). On p 285, there is another, about the incorrectness of *Radwan v Radwan (No 2)* [1973] Fam 35, included by the editors to show there was another view – they continue (with respect, correctly) to regard it as wrong. Chapter 10 is concerned with the topic of Matrimonial Causes. Of necessity, English statutory material has had to be inserted here, especially the Recognition of Divorces and Legal Separations Act 1971 (UK), but the vast preponderance of cases are of great assistance in New Zealand – but not all, eg, *Ponticelli v Ponticelli* [1958] P 204.

Chapter 11, on financial relief, is perforce well filled with statute law, but the cases are, again, valid for New Zealand teaching purposes. The same is true of the chapter that follows on guardianship and custody, which also contains the Council of Europe Convention on Recognition and Enforcement of Decisions Concerning Custody of Children (1980) and The Hague Convention on the Civil Aspects of International Child Abduction (1980). Chapter 14, the final chapter on family law matters, is devoted to legitimacy, legitimation and adoption, but while, of course, interesting and useful, contains legislation not in *pari materia* with our corresponding statute law.

Chapter 14 takes us away to the realms of contract, containing most of the cases one recognises as "old friends", and the EEC Convention on the Law Applicable to Contractual Obligations. Chapter 15 on Torts is embellished by the presence of *Corcoran v Corcoran* [1974] VR 164 and *Babcock v Jackson* (1963) 12 NY 2d 473 in addition to the expected cases. Chapter 16 deals with Foreign Currency Obligations most skilfully, but the contribution that New Zealand law could make to chapters 15 and 16 seems likely to be minimal, if not nil.

Chapters 17-20 are devoted respectively to Immovables, Transfer of Tangible Movables, Assignment of Tangible Movables and Governmental Seizure of Property. Each chapter has a nice selection of cases. (Section 30 of the Civil Jurisdiction and Judgments Act 1982, set out on p 540, will take New Zealanders by storm.) Chapter 21 is short, and is concerned with Administration of Estates. It contains the relevant English statute law and r 29 of the Non-contentious Probate Rules 1954. The Succession chapter, which follows, deals with both intestate and testate succession very ably, but the Wills Act 1963 (UK) would not be relevant to the New Zealand reader. Powers of appointment are covered in addition. The Effect of Marriage on Movables is treated in chapter 23. Chapter 24 covers that slippery distinction between substance and procedure very neatly, and the non-English reader's eyes will pop when he reads, on the first two pages, the provisions of the Foreign Limitation Periods Act 1984 (UK).

The last part of the book is given over to what are called "General Considerations", viz Renvoi (ch 25), Characterisation and the Incidental Question (chs 26 and 27), the Timber Factor (ch 29) and American Methods for Choice of Law (ch 30). The last two chapters should also be of considerable interest and value to jurisprudence experts, and the Parliamentary Draftsmen might read chapter 29 with advantage in this country too.

Teachers will assuredly find that the selection of cases achieves what the editors claim – that it was "intended to strike a balance between the older classic cases and the new ones, with perhaps a bias towards the new" and that the chosen cases "because of their interesting facts or trenchant judgments, are most likely both to inform and interest students and to make our book readable". The book is unreservedly recommended for New Zealand University law libraries and teachers of the conflict of laws as a compulsory purchase. Law students should be firmly encouraged to buy it, especially if their teacher is prepared to "top it up" with relevant New Zealand materials, and larger firms of law practitioners will certainly not regret the purchase of it.

The publishers have, as usual, put the book up in very attractive form. But what gives the most pleasure of all is to find, at long last, a partnership between the two eminent Oxonian (even if the senior partner is now Orfordian) scholars who composed it with such harmonious results. □

Books

FINAL JUDGMENT

By Dina Kaminskaya. Published by Harvill, $39.65

Reviewed by A F Grant of Auckland

It is some time since this book was published (1982), but it would be a shame if that delay was used as an excuse for failing to review such an interesting work.

The authoress, a Russian advocate, was expelled from her home country in 1977. From exile she has written this book about the workings of the Russian Criminal Courts, of the ways in which the constitutional ideals are disregarded, and of a Judiciary each member of which, when instructed by the State to do so, convicts and sentences on command.

State influence

The legal profession is divided into those who prosecute and those who defend. The former have a cordial relationship with the Judges:

> No one bothered to conceal it, either in the Court room or outside. During a trial a Judge would rudely interrupt an advocate or forbid him to put questions whose necessity was obvious. . . . Yet the same Judge would never permit himself to treat a prosecutor that way. During a recess the prosecutor would freely and confidently head for the Judge's chambers, which no advocate could enter. I was present in Judges' offices when the Judge, the prosecutor – and even the investigator – discussed the case on trial. Together they would weigh up the evidence and not infrequently they would settle the defendant's fate then and there, not only the question of guilt but even the sentence.

The Constitution is worded to appeal to any liberal, but this cosmetic device does not frustrate the State. One of the authoress' friends was arrested in the 1950's and *sentenced to many years in a labour camp* for "servile admiration of bourgeois western art". His offence? He had referred enthusiastically at a gathering to the films of Charlie Chaplin!

Solzhenitsyn tells a similar story. A Soviet citizen had been in the United States and on his return said that they have wonderful roads there. The KGB arrested him and demanded a term of ten years, but the Judge said: "I don't object, but there is not enough evidence. Couldn't you find something else against him?" So the Judge was exiled to Sakhalin because he dared to argue, and they gave the other man ten years. Just imagine what "lie" he had told! and what "praise" this was of American imperialism: in America there are good roads! Ten years (Speech to the AFLCIO in Washington DC 30 June 1975 reprinted in *Alexander Solzhenitsyn Speaks to the West*, The Bodley Head, p 28).

Dina Kaminskaya tells of one Judge who was so upset by a directive that custodial sentences should not be given until all other disciplinary measures had been exhausted (it was during a brief thaw in Krushchev's time), that she was sobbing in despair.

> This Judge's tribulations did not last long. As circumstances changed, so did the directives from above. And she, no longer sobbing, was again sentencing women with small children or a teenager who had stolen a guitar to years in prison.

Bribery

She tells of the effect which obedience to directives has on Judges.

> Constantly obliged to flout the law, Judges lost all respect for it; having to infringe the law on orders from above, they inevitably became ready to break it for money as well.

She once acted for such a Judge.

> He never took part in the drinking bouts and orgies that some prosecutors and Judges indulged in, he had no mistresses and he never gambled.

The Judge himself showed no repentence, claiming that justice suffered no harm when Judges took bribes, because they are accepted only for the purpose of giving fair sentences!

She says that the era of wholesale bribery in which that Judge was involved has ended but bribery among Judges, investigators and prosecutors persists to this day. Nevertheless, and this is an interesting thing:

> the judicial system in the Soviet Union does work, and not only convictions but verdicts of acquittal have been given – less often than true justice required, but given they were.

Political trials

The one category of offences in which verdicts of acquittal are *never* given is political offences. The author acted for several "dissidents" at their trials, believing that although she could never secure an acquittal she might achieve a lesser sentence. And it is her account of the political trials which is so revealing. It is probable that few people realise how innocent are the "offences" for which dissidents can be tried. This is the form of the indictments which in 1968 were laid against three dissidents who took part in a peaceful demonstration in Red Square protesting the invasion of Czechoslavakia:

> Having prepared in advance banners with slogans containing knowingly false and slanderous fabrications defaming the Soviet State and social structure, namely, "Hands off Czechoslavakia"; "For your freedom and ours"; "Out with the Occupiers"; "Free Dubcek"; "Long live free & independent

> Czechoslavakia . . ." he took an active part in group actions which grossly violated public order and the normal working of public transport, in that he unfurled the above-mentioned banners and shouted slogans similar in context to the texts on the banners, thereby committing crimes within the meaning of Article 190/1 and 190/3 of the Criminal Code. . . .

The mere "unfurling" of such innocuous banners is a "gross violation of public order"!

And what of the Judge? How unfortunate were the defendants! This was the extent of her bias. Before the trial began, she had told Kaminskaya:

> If I had been in Red Square then, I would have gouged out their shameless eyes with my own hands, and with pleasure.

For political trials, that trial had a strange end. On orders from above it was brought to an abrupt end with the result that many witnesses were never called to give evidence. Kaminskaya was simply told by the Court Administrator,

> The hearing will be finished today. The Court will declare a short recess that will give you a reasonable amount of time to prepare. I think you advocates should find two hours quite sufficient. Don't argue, Comrade Advocate.

The State couldn't even be bothered to provide the semblance of a fair trial. Speeches were made; the defendants were duly sentenced to many years of internal exile; and the Court record was falsified so as to delete evidence which was unfavourable to the State.

And there is more of this type of thing. She tells, for instance, how the KGB pack the public seats in Court, plant bugs in advocates conference rooms and organise rent-a-mobs to intimidate the hardy people who wait outside the Courts in sympathy with the defendants.

As the years went by Kaminskaya discovered that her phone was tapped. The KGB then sent an intimidatory spy to tail her wherever she went. Finally she was disbarred and offered the choice of prison or exile.

Books about the Soviet legal system are occasionally published in the West. A serious student of such literature will find Dina Kaminskaya's book a practical guide to the working of the system.

And those students who wonder what the expression "Rule of Law" means will learn precisely what it means – although in the negative sense – since this book shows with great clarity what it is not. □

Observance of justice

The violation of justice is injury: it does real and positive hurt to some particular persons, from motives which are naturally disapproved of. It is, therefore, the proper object of resentment, and of punishment, which is the natural consequence of resentment. As mankind go along with, and approve of, the violence employed to avenge the hurt which is done by injustice, so they much more go along with, and approve of, that which is employed to prevent and beat off the injury, and to restrain the offender from hurting his neighbours. The person himself who mediates an injustice is sensible of this, and feels that force may, with the utmost propriety, be made use of, both by the person whom he is about to injure, and by others, either to obstruct the execution of his crime, or to punish him when he has executed it. And upon this is founded that remarkable distinction between justice and all the other social virtues, which has of late been particularly insisted upon by an author of very great and original genius, that we feel ourselves to be under a stricter obligation to act according to justice, than agreeably to friendship, charity, or generosity; that the practice of these last-mentioned virtues seem to be left in some measure to our own choice, but that, somehow or other, we feel ourselves to be in a peculiar manner tied, bound, and obliged, to the observation of justice.

We feel, that is to say, that force may, with the utmost propriety, and with the approbation of all mankind, be made use of to constrain us to observe the rules of the one, but not to follow the precepts of the other.

— Adam Smith

Theory of Moral Sentiments (1759)

Public Legal Services

By Jeremy Cooper, Sweet & Maxwell 320pp (including index) (1983) UK £9.50.

Reviewed by Piers Davies of Auckland

This book is sub-titled "A Comparative Study of Policy, Politics and Practice" and is a detailed examination of the operation of public legal services in three countries – United Kingdom, the Netherlands and the United States.

Dr Jeremy Cooper defines public legal services as:

> the provision by lawyers and paralegal workers, of legal advice and assistance, paid for out of public funds, to people with comparatively little means, from offices which are devoted exclusively to that purpose.

He includes Neighbourhood Law Offices (USA), Community Law Centres (UK) and the Dutch equivalent, Bureaus voor Rechtschulp, and argues that these organisations have objectives, methods and philosophies quite different from private legal practice, whether of the central city variety or suburban shop-front lawyers doing legal aid work. Dr Cooper bases his examination on personal experience of public legal services in the three countries, and he is also aware of the legal services structure in Canada, Australia and New Zealand.

Dr Cooper acknowledges the difficulties of a comparative study as the social background can greatly affect any assessment of the public legal services concerned. Viewpoints also differ according to the personal experience of the observer far more than in, say, a comparative study of civil procedure.

However, Dr Cooper demonstrates the value of such comparative studies, by examining in detail local programmes in each of the three countries which illustrate the differences in control, programmes and operations. These local programmes range from the Brent Community Law Centre (North-West London) in the UK, to the Oregon Legal Services Corporation in the USA and the Amsterdam Bureau

Continued on p 326

The determination of indecency under the Indecent Publications Act — A need for greater clarity

By J L Caldwell of the Law Faculty, University of Canterbury.

The author considers the meaning of the word "indecent" as defined by statute and as applied by the Courts and the Indecent Publications Tribunal. He looks particularly at some judicial differences of view.

It is now 20 years since the Indecent Publications Act 1963 came into force, and it is remarkable how little judicial activity has been generated by the problem of indecent literature which was recently characterised by Jeffries J as "notoriously controversial" and "intractable" (see *Waverley Publishing Ltd v Comptroller of Customs* [1980] 1 NZLR 631 at pp 642 and 644). The lack of public debate over recent years is also of note. Much of the credit for this quiescence must be attributable to the good sense and sound judgment of the Indecent Publications Tribunal which by s 10 of the Act is given the task of determining the character and consequent classification of any books or sound recordings submitted to it. (The Courts have jurisdiction over other documents).

Yet to the lawyer there is an obvious danger in placing too much reliance on the commonsense and judgment of the particular members of a tribunal. The members will change. Thus the lawyer looks more to the statute and to the caselaw and hopes to discover therein workable criteria which will provide consistency, predictability, and fairness in decision making.

However an examination of the sparse New Zealand caselaw concerning the interpretation of the crucial word "indecent" in s 2 of the Act reveals an unfortunate situation. For a fairly recent decision of the majority of the Court of Appeal declaring the test to be applied when a document deals with the subject matter of sex (or horror, crime, cruelty, and violence) has, for all practical purposes, not been followed by the majority of the Full Court of the High Court. As most books submitted to the Tribunal concern those subject matters (and in particular the subject matter of sex) obvious difficulties arise.

In *Police v News Media Ownership Ltd* [1975] 1 NZLR 610, the majority of the Court of Appeal held, with McCarthy P dissenting, that when sex was being dealt with a document could be found indecent either on the basis of the ordinary meaning of the word, ie, of it being an "affront to the ordinary common standards of propriety in the community", or on the basis of the statutory meaning of the word as defined in s 2, ie, of it being "injurious to the public good". However in

Continued from p 325

voor Rechtshulp in Holland. These studies are both scholarly and practical and are the central core of the book; Dr Cooper puts these studies into perspective by outlining the history of the public legal services movement in each of the three countries.

The final chapter is a concluding analysis which develops a number of interesting arguments. Dr Cooper points out that public legal services policy is controlled by essentially different groups in each of the three countries – in the UK at the local level, in the Netherlands primarily at the central Government level, and in the United States, balanced between the funding role of the federal Legal Services Corporation and the network of local politically insulated field programmes.

He demonstrates how the differences in who controls the legal services policy fundamentally affects how the legal services have and will develop. He considers that although the UK system allows greater variety in the types of organisations, it leaves public legal services concentrated in the cities and open to sudden reversals, especially if the Tories capture a Labour or a Liberal local body stronghold. In contrast, the Dutch system is now firmly established and protected from political vagaries and even in the USA, the persistent attempts of President Reagan over the last 3½ years to dismantle the Legal Services Corporation and reduce public legal services spending to zero have not succeeded.

The book also contains a postscript on recent developments in public legal services in the UK, USA and Holland, an exhaustive bibliography, and a workable index.

Legal services is a field of the law where everybody is an expert but very few specialise. New textbooks are therefore less than frequent and existing textbooks, articles and thesis studies quickly become dated. Dr Cooper's book is a particularly welcome addition as it combines scholarship with common sense.

For the general practitioner or someone starting out in the study of legal services, the first reference book must always be Michael Zander's "Legal Services for the Community" (Temple Smith 1978). Dr Cooper's book is a worthy second reference book and is accordingly strongly recommended. □

Waverley Publishing Co Ltd v Comptroller of Customs (supra) Davison CJ and Jeffries J held that where the document concerned sexual matters the statutory test alone had to be satisfied before a finding of indecency could be made. The ordinary meaning of indecency was said to be inapplicable.

Since that judgment the Indecent Publications Tribunal has tended to cite the dicta of Jeffries J. But while Jeffries J and the Tribunal assert the need for a finding of injury to the public good, it is apparent from an examination of the Tribunal's decisions that the Tribunal is in fact concerning itself with the protection of community standards of decency.

One wonders though if the Tribunal, or anyone else, can hope to state confidently what the correct interpretation currently is.

The key provisions

The relevant provisions in s 2 and s 11 of the Act are of such importance that they need to be reproduced in full. Section 2 provides that:

> "Indecent" includes describing, depicting, expressing, or otherwise dealing with matters of sex, horror, crime, cruelty, or violence in a manner that is injurious to the public good:

Section 11 provides that:

> (1) In classifying or determining the character of any book or sound recording the Tribunal shall take into consideration –
>
> (a) The dominant effect of the book or sound recording as a whole;
> (b) The literary or artistic merit, or the medical, legal, political, social, or scientific character or importance of the book or sound recording;
> (c) The persons, classes of persons, or age groups to or amongst whom the book or sound recording is or is intended or is likely to be published, heard, distributed, sold, exhibited, played, given, sent, or delivered;
> (d) The price at which the book or sound recording sells or is intended to be sold;
> (e) Whether any person is likely to be corrupted by reading the book or hearing the sound recording and whether other persons are likely to benefit therefrom;
> (f) Whether the book or the sound recording displays an honest purpose and an honest thread of thought or whether its content is merely camouflage designed to render acceptable any indecent parts of the book or sound recording.
>
> (2) Notwithstanding the provisions of subsection (1) of this section, where the publication of any book or the distribution of any sound recording would be in the interests of art, literature, science, or learning and would be for the public good, the Tribunal shall not classify it as indecent.

The caselaw

The first reported case on the Indecent Publications Act 1963 was *Robson v Hicks Smith and Sons Ltd* [1965] NZLR 1113. In that case the Full Court of the Supreme Court was concerned only with the narrow point of whether the criteria listed in s 11(1) were exhaustive or not. With little difficulty the Full Court held that they were not exhaustive, but in the course of their judgments Woodhouse J and Haslam J went on to make interesting observations on the scope of the word "indecent" in s 2. Woodhouse J indicated that a finding of indecency in its ordinary and wide sense would not suffice. His Honour stated at p 1123 that the Act put "an appropriate emphasis upon the need to find a corrosive or actively harmful tendency which is the real justification for restricting or banning material of this sort". Haslam J similarly concluded at p 1121 that the "public good" was the primary element in classification.

However ten years later the Court of Appeal had an opportunity to fully consider the issue. And in *Police v News Media Ownership Ltd* (supra) Richmond J expressly disapproved some of Woodhouse's views with Moller J concurring. The case concerned the conviction of *Truth* newspaper for inserting an allegedly indecent photograph of a naked girl. As noted above, Richmond J held that a document with a sexual subject matter could be found to be indecent under the Act either because it affronted "commonly accepted standards of decency" (as in the ordinary meaning of the word) or because it satisfied the statutory test of being "injurious to the public good". His Honour suggested that s 11(2) of the Act would be entirely redundant in relation to the topics dealt with in s 2 unless the Court or Tribunal was free to take the ordinary meaning of indecent as its starting point.

Dissenting, McCarthy P suggested that the ordinary meaning of indecency was only relevant when subjects other than those specified in s 2 were in issue, eg, if the subject was race, religion, or parenthood. In McCarthy P's view a document dealing with sex, horror, crime, cruelty, or violence was only capable of being found indecent upon proof of some injury to the public. That was, however, a minority view.

In *Re "Action Kids"* (1979) 2 NZAR 41, 43 Casey J seemed to adopt the majority view when he stated that the Tribunal could declare a book indecent ". . . on finding it an affront to naturally accepted standards of decency" although the learned Judge did continue to say that the Tribunal would "normally be concerned with what is injurious to the public good".

However in *Waverley Publishing Ltd v Comptroller of Customs* (supra) only O'Regan J seemed prepared to adhere to the majority view.[1] Davison CJ attempted to reconcile the judgments of McCarthy P and Richmond J. The Chief Justice admitted his difficulty with Richmond J's dual test but, quoting the concluding passage of Richmond J's judgment, he maintained that Richmond J had finally decided that in dealing with books on sex the real test was what the public interest required. This result, Davison CJ argued, was little different from the test requiring some injury to the public good. However it must be noted that this happy reconciliation is somewhat belied by the fact that McCarthy J was clearly dissenting in the case – and indeed reached a different decision.

Jeffries J did not argue for such a reconciliation. Rather his Honour in *Waverley's* case attempted to distinguish the majority judgment of Richmond J and Moller J by confining it to the situation of a criminal prosecution of a newspaper. That distinction is also not without its difficulties. But Jeffries J, radically, expressed his readiness to depart from the majority's interpretation of "indecent" in this

context if it were necessary to do so. Jeffries J then went on to lay down some guidelines for the determination of whether a book (or sound recording) was indecent and injurious to the public good. Those guidelines were if:

(1) It is predominantly concerned with the prurient and lewd aspects of sex; and
(2) The exact subject-matter is described, depicted or expressed in a patently offensive manner so as to concentrate attention and reaction on the prurient and lewd aspects of sex; and
(3) The work looked at in its entirety had negligible literary or artistic merit, and is otherwise not redeemed by its medical, legal, political, social or scientific character or importance.
(4) The likelihood of corruption far outweighs possible benefit.
(5) The sincerity of purpose which produced the item is gravely in question.

Since that judgment the Tribunal has frequently adopted and applied those criteria. However the question must immediately be asked as to whether a book which meets such criteria as patent offensiveness and a concentration on the prurient and lewd aspects of sex is necessarily injurious to the public good. Jeffries J himself accepted that the criteria rely "heavily" upon the ordinary definition of indecency. And certainly the criteria seem more directed towards the protection of the community from shock and offence than towards the maintenance of moral behaviour.

The correct test?

Given that Jeffries J has formulated criteria which concern the giving of offence to the community rather than injury, and given that certain of the criteria of s 11(1) such as literary and artistic merit and honesty of purpose have nothing to do with the degree of harm caused by reading a particular book, it may seem that both legislative and judicial policy is in truth aimed at the protection of community standards of decency. Whilst the Courts and the Tribunal may be reluctant to openly expound such a conservative test it may be, as discussed below, the test with which the Tribunal feels most happy in determining the nature of books. It must also be remembered that until the Court of Appeal itself rules otherwise it is a perfectly correct alternative test when dealing with the subject matters listed in s 2.

The notion of injury to the public good

The Tribunal frequently purports to find some injury to the public good (often on the basis of a likelihood to corrupt under s 2(e)) but rarely do their decisions reveal the basis for such findings. This of course is the nub of the usual objections against censorship. Is there any empirical evidence suggesting that pornography or other "indecent" literature causes social harm? One may instinctively assume that such harm will ensue but the assumption is unprovable and various studies would suggest that it is wrong (see, for example the United States Presidential Commission Report, 1970, and the Report of the Williams Committee on Obscenity Cmnd 7772, 1979). It can be noted though that in 1983 the Tribunal expressly rejected the Williams Commiteee recommendations by stating, without elaboration that

> . . . we do not accept . . . that the written word lacks any potential to cause significant injury to the public good. We find expressly to the contrary.[2]

Whilst Davison CJ indicated in *Waverley Publishing Co Ltd v Comptroller of Customs* (supra) that the Tribunal would be on firmer ground in declaring a book indecent only if it was injurious to the public good, it would, with respect, perhaps be on safer and more familiar ground in declaring it an affront to community standards of decency. For before a finding of social injury can be satisfactorily made, certain questions have to be resolved. For example, can a book or photograph do more than raise erotic thoughts in a person? If those thoughts are of a deviant sexual nature, will they necessarily be translated into behaviour? If erotic thoughts are likely to be translated into socially injurious behaviour, then are not the works of artists such as Michelangelo, Chaucer, and Shakespeare equally likely to cause socially injurious behaviour? Perhaps the test of community standards of decency would be a more reliable guide.

The criterion of the likelihood of corruption is frequently found to be satisfied by the Tribunal[3] and it is arguable that this test is indeed relevant in the determination of injury to the public good. However one would like to know more of the reasons which lead the Tribunal to find that a book has a likelihood of corruption. The problem with making such a finding was frankly recognised by the Tribunal in *Re "How To Make Love To A Single Woman"* (1981) 2 NZAR 559, 560, when it observed that:

> we have had difficulty in assessing the likelihood of corruption arising, because of the intangible nature of the danger with which we are dealing.

That difficulty does not normally deter the Tribunal and one wonders what proof is sought before the finding of a likelihood of corruption is made. In summing up in *Re Penguin Books Ltd* (1961) Crim LR 176, 177, Bryne J defined "to corrupt" as

> . . . to render morally unsound or rotten, to destroy moral purity or chastity, to prevent or ruin a good quality, to debate or defile.

The Oxford Dictionary provides a similar definition. Does the Tribunal always consider these sorts of tests to be satisfied when it makes its findings of a likelihood of corruption? Does it always have some proof?

The tribunal's reasoning

Together with the criterion of the likelihood of corruption the criterion most frequently used by the Tribunal in determining indecency is the criterion suggested by Jeffries J in the *Waverley Publishing* case of "patent offensiveness so as to concentrate attention and reaction on the prurient and lewd aspects of sex". As mentioned previously one wonders if such qualities are necessarily causative of injury to the public good and if it is adequate for the Tribunal to make a finding, as it frequently does to the effect that

> . . . the dominant effect of the

> publication is to portray aspects of sex that can only appeal to a prurient interest and accordingly we find that the publication is injurious to the public good.[4]

The question arises as to why material concentrating on genitalia, contrived sexual poses, and undiluted descriptions of sexual activities – which would generally be held by the Tribunal to have a prurient appeal – should necessarily be injurious to the public good. Similarly when the Tribunal declares that an otherwise acceptable text on male masturbation or the "Kama Sutra" is to be declared indecent because of some accompanying photographs one wonders how the photographs can cause such injury when the text does not[5]

It is perhaps different when the Tribunal finds material on homosexuality, munitions manufacture, or the growing of marijuana to be injurious because Parliament has declared such activities to be criminal.[6] Similarly the potentially dangerous nature of bondage activities could place material on sado-masochism in a different category.[7] However the majority of books and magazines which concentrate on the prurient and lewd aspects of sex would seem to be condemned as indecent only because they may cause offence to the average person in the community. Injury is not really in issue.

This is confirmed by the considerable emphasis given by the Tribunal to the honesty of intention of the author. If the reading of bizarre and disgusting descriptions of sex can lead to public injury then the reputation and sincerity of the author should not save a book which has such descriptions. But, for example, Nancy Friday's book *Men in Love* which contained explicit descriptions of perverted male fantasies ranging from defecation on one's partner to bestiality was not characterised as indecent only because of the author's sincerity and standing.[8] The reaction generated by reading such descriptions would be the same as if the descriptions were contained in a pulp magazine but presumably it was considered that the average person would not be so shocked and offended by the book which was felt to be honestly and sincerely produced. This must be in truth the test which the Tribunal constantly applies.

Reform

If, as is argued, the Tribunal normally applies the ordinary dictionary meaning of indecency to books on sex (whilst using the terminology of the special statutory definition in s 2) the question arises as to whether the test of community standards is a satisfactory one. It has been judicially criticised by both Gresson P in *Re Lolita* [1961] NZLR 542, 552 and Davison CJ in *Waverley Publishing Co Ltd v Comptroller of Customs* [1980] 1 NZLR 631, 638 and it is certainly somewhat vague and arbitrary. However vagueness and a degree of arbitrariness are probably inevitable in this area of law and the test of community standards does at least enable the Tribunal to keep pace with changes in social mores.[9]

Of course there is some argument in favour of either abolishing censorship altogether or at least confining its scope to young children. The arguments are not entirely unconvincing. As there is no evidence of harmful behavioural action being caused by reading, why should the State interfere with the liberty of the citizen to read the books of his or her own choice? If moral debasement does indeed occur by the raising of prurient thoughts in the reader's mind does not the reader voluntarily assume that risk – ie, volenti non fit injuria? If books are denied circulation on the grounds of indecency is there not a danger that works of real merit may be suppressed because they are in advance of their time? One only has to recall the arguments over *Lady Chatterley's Lover* which occurred in the not too distant past.[10]

Against that approach it could be argued that if good literature is assumed to enrich a society then debased literature could equally well be assumed to debase. If restrictions on the expression of racist sentiments are justifiable then are not restrictions on the expression of grossly sexist sentiments equally justifiable? It can also be argued that periods of strict moral restraint such as occurred in the nineteenth century did not inhibit the flowering of great literature.

However these arguments are not really the concern of the lawyer. The lawyer is more concerned with the existence of clear criteria which will be consistently applied and it is unfortunate that this minimum requirement is not yet evident in this area of law.

As the Tribunal noted at the beginning of 1984:

> It is not this Tribunal's function to take one side or the other . . . [of the censorship argument]. Its duty is to carry out its function in accordance with the Statute.[11]

If only it was as easy as that. □

1 See the interesting casenote by D V Williams (1981) 9 NZULR 376.
2 Decision 1083 Gazetted in the *New Zealand Gazette* 27.10.83.
3 Ibid. See also, for example, Decisions 1086 and 1087 gazetted 19.1.84, *"Re Black Temptress"* (1982) 3 NZAR 329 and *Re "1984"* (1982) 3 NZAR 332.
4 Decision 1077 gazetted 5.9.83. See also, for example, Decisions 1078 and 1082 gazetted 29.9.83.
5 See Decision 1071 gazetted 14.7.83 and *Re "The Kama Sutra of Vatsyayana"* (1976) 1 NZAR 143. To similar effect are such decisions as *Re "The Yes Book of Sex — You can Last Longer"* (1976) 1 NZAR 141 and Decision 1011 (1982) 3 NZAR 114.
6 See, for example, *Re "Stallion"* (1976) 1 NZAR 111, *Re "Aequus"* (1976) 1 NZAR 141 and Decision 1081 gazetted 19.1.84 on homosexuality; Decision 1081 gazetted 29.9.83 on munitions manufacture; and Decision 904.
7 See, for example, the reasoning in *Re "Bondage Advocates"* (1982) 2 NZAR 182 and of Decision 1070 gazetted 30.6.83 and Decision 1085 gazetted 19.1.84.
8 Decision 1063, gazetted 19.5.83. Also, for example, see *Re "Pornography: Men Possessing Women"* (1982) 3 NZAR 149, *Re "Ordeal"* (1982) 3 NZAR 329 and *Re "The Hite Report on Male Sexuality"* (1982) 3 NZAR 374.
9 Examples are seen in the changed classifications accorded *"Unusual Sex Behaviour and Practices"* (1976) 1 NZAR 143 and the Hite Report on Female Sexuality in Decison 1067, gazetted 30.6.83.
10 See *Robson v Hicks Smith and Sons Ltd* [1965] NZLR 1113 and *Re Penguin Books Ltd* (1961) Crim LR 176.
11 See Decisions 1-4/84 as reported in (1984) 7 *The Capital Letter* No 4 p 2.

Judicious Disrepect

I think you will agree with me that when a Judge says that a decision is entitled to respect, he is generally preparing the way for an announcement that the exigency has arisen for disregarding it.

J B Callan
Law Conference 1930

Children and occupation of the matrimonial home under the Matrimonial Property Act 1976

By Richard Webb, Professor of Law, University of Auckland

This article was written prior to the publication of the judgment of Inglis DCJ in Wheeler v Wheeler *(1984) 2 NZFLR 385. The headnote to that case sets out the effect of the decision as: (1) The interests of children to which the Court is required to "have regard" by s 26(1) of the Matrimonial Property Act 1976 are those interests which arise in the context of a determination or adjustment of the parents' property rights. The Court is not required to enter into the kind of inquiry into the children's general welfare that is demanded by proceedings under the Guardianship Act 1968. The effect of s 26(1) is to ensure that the outcome of a matrimonial property contest is not framed without regard to the responsibilities of the parents to such children, and the assessment of a custodial parent's position must take into account the effect which any contemplated order may have on that parent's ability to provide a home for those children and generally to care for them. (2) By s 28A(1) of the Matrimonial Property Act 1976 the Court is required to "have particular regard" to the need to provide a home for "any minor dependent child of the marriage". In a matrimonial property case where an occupation order is sought under s 27, the need to provide a home for such children is to be treated as the first and most important consideration, but will not necessarily be appropriate to ensure that the children are provided with a home regardless of other circumstances, and the home to be provided does not need to be of a quality that is unrealistically high having regard to the interests of the parents whose capital must remain tied up for this purpose. The intent of s 28A is to ensure that the obligation of both parents to provide the children with a home, and thus, to that extent, to maintain them, is a priority that is to be recognised to a degree that is realistic in all the circumstances of the case. (3) Where a parent is required to make a contribution under the Liable Parent Scheme, the effect of that parent's provision of a home for the children may involve him or her in providing maintenance to a greater extent than would be justified by s 72 of the Family Proceedings Act 1980.*

Conveyancers and family lawyers will be aware of s 27(1) of the Matrimonial Property Act 1976. It permits the Court to make an order granting to the husband or the wife, for such period or periods, and on such terms and subject to such conditions as the Court thinks fit, the right personally to occupy the matrimonial home or any other premises forming part of the matrimonial property. They will also be aware of the (less frequently met with) corresponding power of the Court to make a vesting order of the tenancy of a dwellinghouse under s 28(1) in favour of the husband or the wife. They will also be aware of the injunction in s 26(1) to the effect that the Court must, in proceedings under the 1976 Act, have regard to the interests of any minor or dependent children of the marriage.

It is the aim of this article to note briefly how the Courts approached the matter when called upon to decide whether to grant an occupation order to a spouse resident in the matrimonial home with children of the marriage or to order a sale at once or almost at once.[1] Always provided, of course, that the home is matrimonial property. In *Kwasza v Kwasza* (1983) 2 NZFLR 88 it was held that, if it turned out that the property sought to be occupied under s 27(1) was not matrimonial property, there was no ground upon which a Court could exercise its discretion to make an occupation order. The article also aims to pose, at any rate, the question whether further legislative intervention was necessary.

The initial years

The first real landmark in this context must be the decision of the Court of Appeal in *Doak v Turner* [1981] 1 NZLR 18 (CA), judgment being given on 13 May 1981. It is, nevertheless, interesting and instructive to see just what jurisprudence the Courts were building up in the earlier years. At times, the Court might say it was inequitable to make the husband wait any longer for his interest in the home, even in circumstances that might now seem hard on a wife alone, and refuse an order under s 27. See *Turner v Turner* (1977) 3 NZ Recent Law (NA) 200, where there were no children (Mahon J). An order was refused by Roper J in *Van Zanten v Van Zanten* (1977) 3 NZ Recent Law (NS) 228, to a wife of 54, who alleged her own ill-health, the need to care for an adult, somewhat intellectually handicapped son, and her husband's misconduct, not to say her own inability to buy him out. It was held that the misconduct did not justify denying him his interest in the home. His health was poor, the son had been working for some time and was providing for himself, and the wife

Transferable Development Rights

By R P Boast BA LLB, a Hamilton practitioner

Over the years town planning has become more complex in its practical effects, more important in its legal implications, and more significant in its economic consequences. The issues that town planning raises are still being debated and innovative suggestions continue to be made to deal with problems that arise. In this article the author considers one proposal to deal with the concept of "air-space". Many readers will recall that some years back the Wellington City Council sold air-space above a parking building to an entrepreneur. The James Cook Hotel was subsequently erected on, or should it be "in", the site thus made available.

Introduction

Many innovative new techniques in planning law escape the notice of the legal profession. Lawyers are accustomed to perceiving changes solely through the medium of new case law and statutes, but in planning law many advances come not in this way at all but instead by means of discussion of overseas developments in the professional town planning literature and the incorporation of such ideas in district schemes as the latter come up for review. A significant conceptual advance of this type which appeared in precisely this way was bonus or incentive zoning, pioneered in the United States in the 1960s and which made its first appearance in New Zealand district schemes a decade later. This technique is now a ubiquitous feature of New Zealand city planning and has served to transform the appearance of the central business districts of Auckland and (especially) Wellington.

A somewhat similar example of an interesting planning technique developed in the United States a decade ago which is now making an appearance, albeit tentative, in this country is the subject of this article, transferable development rights (TDR). It is a technique which poses some formidable problems but which offers new solutions to what have seemed to be insuperable difficulties besetting amenity controls. The object of this article is to explain the nature and background of TDR, including a consideration of both the difficulties and benefits attendant on its introduction into the New Zealand town planning system.

What is TDR?

The basic concept is simplicity itself. TDR makes unused air space a transferable – and even a marketable – commodity. The "development rights" are the difference between a building's actual height, and the permitted height – so that a three-storey building in an area zoned for buildings up to ten storeys obviously has unused development rights equivalent to seven storeys. The technique allows the severance of these rights from the building lot and their transferability to other lots about the city. The transferred rights may then be added on to the transferee lot *in excess of* (within limits) the floor space allowed by the planning instrument for the transferee site. The building owner is only allowed to transfer his development rights in exchange for accepting an amenity restriction (such as a control on demolition of a registered historic building), and the obvious beauty of the technique is that the owner receives compensation but at no direct cost to the community.

An example of the potentialities of the technique is conveniently afforded by the Planning Tribunal decision in *New Zealand Historic Places Trust v Wellington City Council* (1979) 6 NZTPA 538. In this case the Historic Places Trust had appealed to the Tribunal to delete a building situated at No 22 The Terrace from its register of historic buildings. The building in question was a 19th-century two-storey wooden house in central Wellington in a part of the city zoned for high-rise development, a fact which had naturally affected land values considerably.

In the absence of any compensation being available to the owner of the building, the Tribunal felt that compelling the owner to retain his building was much too harsh a restriction, and the Wellington City Council's decision was upheld, much to the dismay of the Historic Places Trust and civic and amenity groups. Under a TDR system, however, the owners of the building could have sold or transferred the unused airspace above the building as a consequence of its registration in the district scheme, and thus would have been compensated without there being any necessity for acquisition by either the Trust or the City Council.

TDR was first developed in New York City, where the world's first TDR ordinance was adopted in 1968. The New York system, as it ultimately evolved,[1] allows owners of listed historic buildings and areas of open space to transfer the unused development rights to other lots in the same ownership, provided that the transferee lot is within a certain specified distance of the transferor lot (the "adjacency restriction"). There are restrictions, too, on the amounts by which the transferred floor space may exceed the applicable height limits for any one transferee site (the amount of excess being normally referred to in the jargon of American writers on TDR as the "overage"). The New York system, or variants of it, have since been adopted in a number of other municipalities, most notably San Francisco, and has attracted enormous interest amongst legal

considerations relevant only to a particular case. The need to provide a home for children of the marriage, considerations of health and age, the desirability of bringing finality to a marriage dispute and of affording parties an opportunity to re-establish themselves by obtaining their shares of capital from the matrimonial home, may be some of the pressing considerations in each case. But it would be wrong to lay down a general rule that some of them must receive more weight than others. Nor is there any onus on one side to make out a case for an occupation order or against it. The Court is not directed to exercise its discretion in a particular way unless there are considerations which persuade it to a contrary view. The approach of the Court must be flexible. But ultimately the inquiry must be as to what is just and fair in the particular circumstances of the case.

About a year later, in *Richards v Richards* (1982) 1 NZFLR 243, Judge Bisphan made the important point that s 27 stood on its own and was capable of application where the major matrimonial issues had not yet been resolved. He made an order under it – as an interim measure only and lasting until final resolution of those matters – allowing the wife and children back into the former matrimonial home. Having cited the above guidelines laid down by McMullin J, he added at p 248 his own non-exhaustive criteria.

(a) The respective matrimonial property interests of the parties in the home (usually this will be an equal share and will not trouble the Court further except that the Court must continually bear in mind this factor, ie, that both parties have an equal interest in the property and an equal right to be there). If the interests in the property are not equal or appear not to be equal, then that must be a consideration.

(b) The circumstances of the spouse seeking to return to or remain in the home, eg, health, age, the conditions that the wife and children are living in if they are away from the matrimonial home or the fact that the husband might run his business from the home.

(c) The suitability of the home for the spouse wishing to remain or return there.

(d) The financial circumstances of the parties in relation to the home. Generally the spouse wishing to be in the home must be able to afford the outgoings thereon.

(e) The interests of the children. Section 26 is quite explicit and needs no elaboration. However, it becomes important in my view to ascertain which of the two spouses is the more likely to retain the actual care and control of the children.

(f) The balance of convenience in relation to the parties pending the determination of the matrimonial issues.

(g) Conduct or more properly misconduct. I do not propose to define this further because of the infinite variety of factual situations, but this matter clearly is a consideration when the discretion is to be exercised.

Early sale

In the post *Doak v Turner* period there do appear to be cases where sales, at any rate on the fact of it, seem to have been ordered to take place with a – in the opinion of some – more or less unexpected speed. In other words, the occupation order, if any, was not to be for a substantial length of time. For instance, in *Ruck v Ruck* (1981) FLN [10][6] the parties had been apart for ten months at the date of the hearing. There were children of 16, 14 and 10 living with the wife in the home. Judge Maxwell held that an immediate sale was not appropriate, but ordered that the property be sold not later than 31 March 1983, ie, some 17 months hence, so as to enable the parties to make arrangements and give the younger children time to adjust.

In *Broughton v Broughton* (1982) FLN [61] children aged 15 and 12 were living in the home with the wife after the parties' separation in 1975. The husband remarried. The wife, who was opposed to the sale, had paid the outgoings since separation and had executed some capital improvements on the home. The husband had, however, paid maintenance. Judge Headifen held that the wife should have six months in which to find other accommodation, and the property must then be sold.

An immediate order for sale was made in *Vosper v Vosper* (1982) FLN [82]. After separating late in 1978, the wife remained in the home with the three children aged 15, 13 and 10. The eldest subsequently left to live with his father. The home had been sold to the spouses by the parents of the husband and was regarded by them as their family home. The wife desired an occupation order until the younger daughter left school, but Judge Trapski took the view that, having regard to the children's ages, it was preferable that the family resettle now rather than at some time in the near future when they might need greater stability.

In *Jones v Jones* (1982) FLN [115], there were two children of the marriage, aged five and three, who had been with their mother in the home since the parties' separation in 1978. She opposed its sale on the ground that the possible change of school and location might harm them. Judge Ryan held that, as there was no pressing need for immediate sale, the home should be put on the market in 18 months' time approximately, when the parties would have been separated for five years. This would give the parties time to organise their lives and those of the children.

Clean break

Pollett v Pollett (1982) FLN [117], strikes as a particularly strong case of a "clean break": the wife and children, aged from 6 to 13, remained in the home after separation, the wife sought possession until the youngest child was 18 or earlier left school. Alternatively, she asked that, if the home were sold, $50,000 be set aside to buy a home for herself and the children. The husband said he would make a contribution to assist such a purchase if necessary. Refusing an order for occupation, Judge Bremner said it would be better for the children and just towards the spouses if the house was put on the market at the end of the school year (ie, in about six months time).[7]

The home was ordered to be sold in *Archer v Archer* (1982) FLN [118] although the wife and three children had been resident in it since the spouses' separation about a year previously. The home was to be placed on the market at the expiration of three months from the date of hearing. Judge Headifen said that this

would give the wife a chance to try and raise finance in order to buy her husband's share in the home and give her the opportunity to make arrangements for alternative accommodation for herself and the children. In *Watson v Watson* (1982) FLN 2 (2d) Judge Beatson ordered an immediate sale of the home because there was no evidence to show that a change of home would be detrimental to the parties' adopted children and because, on getting her share of the net equity in the home, the wife would be able to buy a suitable home for herself and the children, albeit of a more modest nature. The learned Judge put it that there was really no evidence which went further than "that the children and the wife would like to stay in the matrimonial home if they could" and that "it is a stable relationship between child and parent which is the important factor and not necessarily a bond between child and a particular home".

In *Tomlin v Tomlin* [1983] NZ Recent Law 289; (1982) FLN 7 (2d), there were children of 18, 15 and 10 in the matrimonial home with their mother, who desired that it be preserved as such until the youngest child should complete his secondary education. There was no reasonable prospect of her buying a new home. The alternative was rental accommodation and, possibly, several moves. In the interests of the two children still at school, Judge Mahony held that he would order postponement of sale for three years, ie, when the youngest child would be 13. The husband had remarried and wished to finance a new home. His alternative was rental accommodation also.

In *Watson v Watson* (1983) FLN 36 (2d), children aged 8 and 19 were living in the former home with their mother, whose marriage had been dissolved about a year previously. The husband sought a sale, having entered a de facto relationship with a woman with whom he had bought a house. This household's income was substantial, but so were its commitments. The accommodation was considered inadequate by the husband for the public relations aspects of his job. His share of the proceeds of the home would not enable him to obtain better accommodation than he now had. He sought a "clean break". Judge Fogarty held that the spouse requesting postponement of the sale bore the onus of justifying it.[8] The wife's reasons were that the younger child, well settled in the home and close to his school, would be upset at having to leave and that she was trying to re-establish herself and would have to give up her university studies.

They were held not to justify a long postponement of sale. The child might become more attached to the house if matters were left another four or five years and suffer greater detriment. The wife had not persuaded the Court that she would necessarily have to give up her studies. Judge Fogarty was minded to order a sale in five or six months' time. The husband was prepared to allow nearly nine months, however, and the Court ordered accordingly. The wife was in no financial position to buy out the husband's share then or in the foreseeable future.

In *Dodds v Dodds* (1982) FLN 39 (2d), the wife remained in the home with children aged 14, 15 and 18 and her mother, who had loaned $8,000 towards the price of the home but had not become a co-owner of it. The husband lived in rental accommodation in which there was no room for his children to stay for overnight access. He sought an order for sale. If there were a sale, each would get a reasonably substantial sum enabling the purchase of other property. The major issue was whether the home should be retained for three years or for such time as the wife took to raise finance to buy her husband out or sold. The Court found that the wife could not firmly guarantee that funds to buy her husband out would be available in the near future, and that she had had a substantial "period of grace" since over two years had elapsed since the separation. Justice to the husband required that the property be sold within three months.

As to the wife's mother, it would obviously not be in her interests to be moved. Section 26 of the Act does not apply to relatives, other than children, who might be dependent on the relevant spouses. Thus the mother's position was not a factor which the Court could consider – a point to be borne in mind by, eg, parents living in the home of a married child.

In *Smith v Smith* (1982) FLN 45 (2d), Judge Taylor approached the case on the basis that, in the main, orders for exclusive possession by a custodial parent for any length of time were the exception rather than the rule. The parties separated in 1980. Children aged 12 and 13 occupied the home with their mother and went to school in the locality. The husband established a new family and lived in rental accommodation the tenancy of which was of uncertain duration. He needed more money. He had "stood out" of his share for over two and a half years. On the other hand, the mother had no practical prospect of buying another home in the area. The Court took the view that the younger child should finish her intermediate schooling before any move and postponed the sale for just over one year.

Mortgage advance

In *Hooper v Hooper* (1982) FLN 54 (2d), the parties had separated by consent after a 19-year marriage. The wife remained in the home with the 13-year-old child. The home was in excess of their basic needs, but the wife would have difficulty in buying a suitable flat with the proceeds of their matrimonial property settlement as a whole. She could not buy her husband out, but could service a modest mortgage. She wished to remain in the home until the child left school, ie, for up to a further four years. This was resisted by the husband, who was in an infinitely better position incomewise to raise money to buy another property. Judge Bisphan did justice between the parties by ordering a sale of the home at current market value after a year, or earlier if the wife agreed. But he also ordered the husband, from his share of the sale proceeds, to advance on security of any residential property bought by the wife up to $5,000 for three years the advance to be secured by second mortgage bearing interest at 5 percent. This is an eminently sound way of cutting the Gordian knot, it is submitted.

The decision of Judge Taylor in *Parkinson v Parkinson* [1983] NZ Recent Law 290 may now be considered. The parties had separated as long ago as 1978 and the wife and two children had since then had exclusive occupation of the home. The husband paid all the outgoings. The wife sought to have continued occupation until the younger child had completed her education. The wife had worked for short periods during the separation, but had not undertaken permanent employment or made any effort to procure job training. She was granted one more

year's occupation. She would have by then have had five and a half years' rent free accommodation and the child would have completed her primary schooling.

Substantial duration

On the other hand, there were cases where a spouse with child or children in the home were given occupation orders of substantial duration. For instance, in *Jarvis v Jarvis* [1981] FLN [38]; a High Court case (Cook J), the husband had four of the five children of the marriage with him in the home, the youngest being eight. The parties had separated in 1978. An order was made, the practical effect of which was to allow him to occupy the home until the youngest child was 16. In *Hogan v Hogan* (1981) FLN [74] the former wife and the children of the marriage, aged 15 and 13, were in the home, the husabnd paying maintenance. The former wife had improved the property. Judge Finnigan declined to order a sale on the basis that a change of home at this juncture would adversely affect the children. Despite the former husband's forbearance (the marriage was dissolved late in 1979) (ie, two years previously), his entitlement was outweighed by his children's needs.

In *Sinton v Sinton* (1982) 1 NZFLR 406. It was said by Judge Mahony of a wife paying all outgoings and doing improvements, and whose children's lives would be disrupted if a sale were ordered, that she ought not to "be disturbed while the children are at primary school",[9] unless there were some significant change in circumstances. The children were aged six and seven and there was nothing about the husband's situation showing any real immediate need to realise his interest in the home. In *Baird v Baird* [1983] NZ Recent Law 289, the parties had separated in 1974 after 13 years' marriage and the wife had lived in the home since with the five children of the marriage. She had had no support from the husband even when he had had the capacity to pay maintenance. (In 1978 he was involved in an accident.) At the date of the hearing, four of the children, two of them under 16, were still living in the home with their mother, who had no prospects of acquiring other accommodation. Vautier J ordered that the house should be sold not later than the date on which the youngest child attained 16.

In *Hatton v Hatton* [1983] BCL 1186, a home had been vested in the spouses as tenants in common and the wife lived in it with four children of the marriage. The husband, who was much better off, sought a sale as he wanted matters finalised. Barker J agreed that there should be a sale, but only when the youngest child had left school, adding that the interests of the minor children needed to be protected.

The sheer economics of the case may, of course, mean that neither spouse can continue to keep the home going for very much longer so that, sooner or later, factors outside their control will force a sale. Thus in *Jurie v Jurie* (1983) FLN 109 (2d), the only fair and just way out was for Judge Headifen to defer the sale, for some six months from the date of hearing, to enable the wife, who was not in good health, to make suitable arrangements, meanwhile relieving the husband of some of the burden of paying the outgoings. Two children were originally with the mother in the home. Th elder later went to live with the husband in his rental accomodation. The younger child remained with the wife, who received maintenance in respect of it. She did not seek an occupation order but merely a 12-month deferment of sale because of her ill-health.

Statutory amendment

It is well-known that concern was expressed in some quarters that homes were being ordered to be sold in accordance with a "clean break" principle in order to allow the spouses themselves to start life anew despite the fact that young dependent children were on the scene who would need roofs over their heads. The above cases appear to indicate that it was only in the exceptional case that a comparatively swift sale order was made where it was not practicable for the spouse with the children to buy or otherwise obtain alternative accommodation.

Nevertheless, the legislature stepped in. Subsection (1) of the new s 28A enacts that the Court (a) in determining whether to make an order under s 27(1) or s 28(1); and (b) in determining, in relation to a s 27(1) order, the period or periods, the terms if any, and the conditions if any [10] of the order, *shall* have particular regard to the need to provide a house for any minor dependent child of the marriage and *may* also have regard to all other relevant circumstances. Subsection (2) states that nothing in the section is to limit the generality of s 26(1).

A new section 28B was also inserted by the amending Act. It gives the Court power, in conjunction with s 27 and s 28 orders, to make furniture orders. Thus, at the end of the day, immediate sharing of these items as well as the home, may be denied to the non-occupying spouse. On the other hand, if a s 27 and s 28 order is made, a home bereft of furniture, etc, is not of great advantage to the occupying spouse, and it must be admitted that s 28B is a valuable adjunct.

What, then, is now to be said? That the new section 28A is mere "window-dressing" because the Courts were already deciding cases in accordance with the rule it lays down and there is no change in the law? Or, to pick a few examples from the cases set out above, are we now to say that occupation orders of considerable duration should have been made in *Broughton; Vosper; Jones; Archer; Tomlin* and *Watson*?

Going back to pre *Doak v Turner* days, was Roper J incorrect in saying, in *Rountree v Rountree*, that the children (aged five and seven) were young and, if they were to be uprooted, it was better that it be done now? Or does the Act simply set out to reverse Judge Taylor's approach in the *Smith* case, viz, that, in the main, orders for exclusive possession by a custodial parent for any length of time were the exception rather than the rule?

Or is it just an express reminder not to forget s 26(1)? Or are ss 26(1) and 28A, taken together, to be considered to amount to an instruction to decide cases as if s 23(1) of the Guardianship Act 1968 applied, viz, that the relevant child's welfare is the first and paramount consideration? This would seem to put matters too high, since having "particular regard to" the need for providing a home for minor dependent children cannot be intended to convey that matters are to be decided in accordance only with the paramountcy of the relevant child's welfare.[11]

New family regime

Perhaps the recently reported decision of Judge Headifen in *Rodger v Rodger* [1984] NZ Recent Law 16, will prove to be a copybook example of what it is hoped the new s 28A will

achieve – although it was not in force at the time the case came before the Court. The wife and children, aged three and under one at the date of hearing, had occupied the home since the parties parted in the middle of 1982. The husband had gone into rental accommodation with his de facto wife and her two children and accordingly wanted his share of the equity in the former matrimonial home, the equity being $50,000. Neither spouse had the means of buying the other out. The wife could not get another Housing Corporation loan because she was not entitled to another. She would not be able to meet the payments other means of financing would call for.

Applying the *Turner v Doak* decision, the Court gave the wife the occupation order she sought – until the younger child was six. It was considered that this would allow her to make suitable arrangements for schooling and for finance for another home and would provide a home for the children in their very early formative years where they could learn to have security of environment and a settled existence.

As far as the husband was concerned, his decision to set up a de facto relationship was a matter for his concern only and he was entitled to start afresh in whatever circumstances he wished. The Court concluded that if there ever was a case for an occupation order, this was one. On this footing, the non-occupying spouse takes on a new family regime very much at his peril in this context. Indeed, one might prophesy that there will be a doctrine of *volenti non fit injuria* at play here. The order in this case would last at least five years, the date of hearing being 18 August 1983.

Conclusion

It is submitted that no legal adviser can go very far wrong in this difficult context if he bears in mind what was said by McMullin J in *Doak v Turner* and by Judge Bisphan in the *Richards* case and, at the same time, remembers the contents of the new ss 28A and B.

One of his intractable problems will be to decide, in order to give concrete advice, what the Court will be likely to see as being the kind of "relevant circumstances" to which it may pay regard. It is thought that the Courts may well properly continue to ask themselves, eg, how long the parties have been separated; has the occupying spouse already had a "period of grace"; how old are the children; is it fair to make the non-occupying spouse who has stood out of his or her share for a substantial time wait any longer; will the spouse seeking exclusive possession get enough from the sale or the settlement of the matrimonial property dispute as a whole to rehouse; is it right to order the sale of a home that would be in excess of the possessor spouse's and the children's reasonable needs when, had the home not been of such a high standard, a sale would not have been ordered?

It has been observed, by Judge Bisphan in *McCoy v McCoy* (1983) FLN 112 (2d), that: "I can think of no recent case where after separation a spouse with custody of the children has had the right to remain in occupancy of the matrimonial home for a period as long as 12 years." The case was one concerning s 21 of the 1976 Act, and not s 27 at all. But, were the spouses' agreement to be adhered to, the wife's exclusive occupation of the home – until the youngest child was 16 – would have lasted that long. The agreement was upheld as not being unjust.

It was also observed, by the same learned Judge in the same case.

> There may well have been cases immediately after [the] passing of the Matrimonial Property Act 1976 in which long-term occupation orders were made but recent trends have been against this. I propose to take this into account also although I have some reservation about it.

The effect of the agreement was to keep the husband out of his share of the home for a further six years and to impose continued financial strain on him in the matter of paying outgoings.

Is it, perhaps, the message of s 28A that no Court need now fear to make such long-term orders? Certainly, no Court has explicitly said that there is any particular age, or stage in a child's life, at which he or she can (or cannot) be moved without disturbance. Possibly, as in some custody cases at present, psychological evidence will from time to time be required on this matter.

Perhaps also some flexible rules of thumb will emerge, such as that, if the youngest child is at primary school, a s 27 or s 28 order will, all other things being equal, last until primary schooling is finished. *E contra*, it may emerge that where all the children are pre-play schoolers, the "clean break", all other things being equal, should occur at once or virtually so. It may also emerge that where no *Hooper*-type *via media* solution is possible, a maintenance-and-outgoings paying non-occupying spouse can prima facie regard it as unfair that the occupying spouse should have lived rent-free for a substantial period,[12] and can reasonably expect an immediate sale, children notwithstanding. □

1 This article assumes a proper resort to s 27(1). cf *Stocker v Stocker* [1978] NZ Recent Law 312; *Eade v Eade* [1979] NZ Recent Law 22.

2 See *Hackett v Hackett* [1977] 2 NZLR 429 (Jeffries J) *McKinstry v McKinstry* [1981] NZ Recent Law 87, (Hardie Boys J) in both of which it was held that there must be a virtual immediate sale, postponement not having been justified. See, too, *Nicklin v Nicklin* (1977) 3 NZ Recent Law 324 (White J).

3 He allowed the husband to occupy the home until 31 January 1982, when the youngest child would be 16.

4 Occupied by the wife, her 18-year-old daughter by a previous marriage, and the parties' son aged 9.

5 For other cases in which children did not figure see, eg, *Turner v Turner* (1977) 3 NZ Recent Law (NS) 200; *Bilger v Bilger* [1979] NZ Recent Law 347; *McKillop v McKillop* [1980] NZ Recent Law 289; *Holmes v Holmes* (1982) 1 NZFLR 278.

6 And see *Newman v Newman* (1982) FLN [110] (home to be put on market in some 17 months' time).

7 The case was one where the Court thought that the husband should make capital provision out of his share of the matrimonial property and envisage his paying maintenance to cover their upbringing. This, it is submitted, justified the "clean break" as to the home.

8 Thus going back to the already discredited approach laid down in *Hackett v Hackett* [1977] 2 NZLR 429 in the early days of the 1976 Act.

9 For a similar case, see *Smithyman v Smithyman* (1983) FLN 111 (2d) (Judge Finnigan).

10 As to which, see *Sammut v Sammut* [1983] NZ Recent Law 243; *Rutherford v Rutherford* [1970] NZ Recent Law 134; [1970] NZLJ 294. The cases were not concerned with children.

11 The needs of children of the spouse who will not be occupying the home, and, indeed, of his or her de facto or a second spouse – would seem to be relegated to the second half of the subsection. Quaere how one decides a case where the children of the marriage are subject to a joint custody order or, say, the father has custody of the boys and the mother of the girls?

12 As in the *Parkinson* case, where the occupying spouse lived rent-free for five and a half years.

Solicitor's liability to third parties:

(II) Solicitor's duty to those dealing with his client

By A M Dugdale, Visiting Lecturer in Law, University of Canterbury

This is the second of two articles on questions of professional negligence arising from the Court of Appeal decisions in Gartside *and* Haddow. *The first article dealt with the disappointed beneficiary and was published at [1984] NZLJ 316.*

In the first part of this article, we considered the solicitor's duty to those his client intended to benefit and it was suggested that there was no good reason why a duty should not be owed to disappointed beneficiaries or intended donees. In this part, we shall consider whether a solicitor should owe a duty of care to those with whom his client is dealing, parties on the other side of the transaction from the client. In a number of recent cases accountants retained by a company have been held to owe a duty of care to those dealing with their client, eg, lending to or purchasing the company relying in part on the statements produced by the accountants.

But what applies to accountants does not necessarily apply to solicitors. It must be remembered that the essential function of an accountant in the auditing context at least, is to provide an independent and reliable report on the client's financial position. In contrast, the essential function of a solicitor is to represent his client's interests. It is not to check that his client's legal arrangements are in every way reliable for the benefit of other parties. That is for those dealing with the client to ascertain for themselves. Consequently, the general principle is, as stated by Megarry V-C in *Ross*, that:

> the solicitor owes no duty to those who are not his clients. He is no guardian of their interests. What he does for his client may be hostile and injurious to their interests; and sometimes the greater the injuries the better he will have served his client.

Nevertheless, there may be exceptional cases where a duty is owed and one such is illustrated by the recent decision of the New Zealand Court of Appeal in *Allied Finance Investments v Haddow* [1983] 1 NZLR 22.

Allied Finance v Haddow

This case concerned a loan of $25,000 on the supposed security of a yacht which the lender believed the borrower to be purchasing. In fact, the yacht was purchased not by the borrower personally but by a company he controlled. As a result, when the borrower became bankrupt, the lender had no security over the yacht itself. Indeed the yacht had been repossessed by its previous owner when the borrower's company defaulted in payment. The lender managed to recover some $18,000 from the previous owner and then sought to recover the remaining $7,000 from the borrower's solicitors.

The basis of the lender's claim lay in the fact that before the loan was made, their solicitor had forwarded to the borrower's solicitor an instrument of security over the yacht for execution and requested and obtained from the borrower's solicitor a certificate that the instrument by way of security was fully binding on the borrower. The Court had no difficulty finding that, although the certificate might have been literally correct in the sense that the borrower was personally bound, in all the circumstances it gave a misleading impression that it was binding through a charge on the yacht. The Court further found that the borrower's solicitor had acted negligently in issuing such a certificate when he well knew that the borrower did not own the yacht and could not give a charge over it. The Court also found that the solicitor's negligent misrepresentation had caused the lender's loss.

Although the precise chain of events leading to the loss, ie, the repossession by the previous owner, might not have been reasonably foreseeable, the type of loss was so foreseeable. It was foreseeable that because the borrower was not the owner of the yacht, the lender would have inadequate security and suffer loss as a result. As the type of loss was reasonably foreseeable, it was not too remote. With negligence and foreseeable loss established, the only remaining question for the Court was whether the borrower's solicitor owed a duty of care to the lender.

Giving the leading judgment, Cooke J accepted that normally the relationship of solicitor to those dealing with his client is not sufficiently proximate. "Such a solicitor is entitled to expect that the other party will look to his own solicitor for advice and protection." Then he commented, "but surely the result of the established principles is different when on request a solicitor gives a certificate on which the other party must naturally be expected to act. . . . The proximity is almost as close as it could be, short of contract." Having found proximity, he

proceeded to the second stage of the *Anns* enquiry and stated, "nor are there any sufficient negativing considerations. Far from disclaiming responsibility, the solicitor has virtually in terms accepted it."

The other judges, Richardson and McMullin JJ adopted a similar approach and their judgments very much foreshadow what there were to say two months later in the *Gartside* case. The principles of privity and privilege were not considered to be a bar to a duty. The status of the profession as one to be relied upon and the fact that the profession was insured in the context of seeing tort as a loss allocation mechanism, were noted.

The scope of the duty

Once again it is not easy to determine the scope of the duty – this time to those dealing with a client. The Court in *Haddow*, as it did in *Gartside*, refused to be drawn on the question, arguing that liability should be determined on a case by case basis. However, McMullin J did stress two factors when holding that there was sufficient proximity. First, the fact that the lender's solicitor had no direct means of checking whether the security was fully binding. As there is no system of registration of title to yachts similar to that for land title, he could not easily check that the borrower did in fact own the yacht. Secondly, what the lender's solicitor requested and obtained from the borrower's solicitor was an undertaking that the security was fully binding. In the absence of both those factors it seems very unlikely that a duty will be imposed. The Canadian case of *Wynston v Macdonald* (1980) 105 DLR (3d) 527 illustrates such a situation.

In *Wynston*, the plaintiff had lent $250,000 to the defendant solicitor's client, taking a mortgage over the client's property as security. To the knowledge of the client's solicitor, an associate of the client (also represented by the same solicitor) had recently purchased the property for $180,000 and the same day sold it to the client for $300,000. When the client defaulted in payment, the lender found that the property was not adequate security for the loan and suffered a loss of $140,000. He sued both his own solicitor and the borrower's solicitor for negligence.

The Ontario High Court found that the borrower's solicitor was not a party to the seemingly fraudulent scheme of his client to inflate the apparent value of the property but it also found that he would have been "naive not to suspect that his client was obtaining a mortgage for more than the property was worth". The Court also found that, although the lender had asked his solicitor to confirm that the borrower's purchase of the property was bona fide, the borrower's solicitor had not been asked to give such an undertaking. However, at the request of the lender's solicitor, the borrower's solicitor had given him a statement of adjustments detailing the purchase by the lender from his associate. The Court found that the borrower's solicitor must have known the reason the statement was requested, ie, as a check on the value of the property, and must have known that "the statement while perfectly correct in itself, did not tell everything". Arguably, it was misleading in the same sense as the undertaking in *Haddow*. Nevertheless, the Court found that the borrower's solicitor owed no duty of care to the lender.

The Court emphasised the facts that the solicitor had not given anything approaching an undertaking that his client's purchase was bona fide, and that the borrower's solicitor could easily have checked the bona fide of the sale by searching the title and were negligent in not so doing. The Court concluded that, in the circumstances, it could not be said that the solicitor knew he was being relied upon by the lender. The lender:

> put his trust in his own lawyer and relied on that lawyer's skill and judgment. (The lender's solicitor) did not trust (the borrower's solicitor) or rely on his skill or judgment. They asked for certain documents from him which they thought would resolve their problem. They were wrong and that is where the difficulty lay.

Haddow and *Wynston* clearly fall on opposite sides of the duty line. Between them lies the problem area. In *Haddow*, McMullin J suggested that in a convenyancing transaction solicitors giving undertakings as to matter known to them and not to the other side should owed a duty, because otherwise ". . . the conduct of day to day business would be made difficult if such undertakings could not be given and relied upon." Again in *Wilson v Bloomfield* (1979) 123 Sol Jo 860 the English Court of Appeal refused to strike out as disclosing no cause of action, a claim that the purchaser of property was owed a duty of care by the vendor's solicitor when the latter was answering pre-contract enquiries as to boundary disputes concerning the property. If the information given in the answers or undertaking were not easily checkable by the other party's solicitor, then following *Haddow* it seems that a duty would be owed.

But what if the information could have been easily verified? What if, as in *Wynston*, the other party's solicitor was really trying to lighten his workload by persuading the opposing solicitor to give an undertaking on a matter that he should have investigated as part of his retainer? At the very least, liability would be shared by both the solicitors, but in *Wynston* the Court was concerned lest imposing a duty on the solicitor giving the information should encourage sloth on the part of the solicitor whose responsibility it really was to investigate the matter. The Court seems to have regarded the disencouragement of sloth as a more important policy consideration than the encouragement of integrity through imposing a duty on the solicitor giving the information.

Clearly, difficult problems are raised in this context and the case by case approach of the Courts may be the only road to take. Examining the particular facts of the case in question may be preferable to any attempt to state general principles.

The unrepresented third party

In both *Haddow* and *Wynston*, the third party was represented by his own solicitor and as we have seen the Courts regarded any duty owed by the client's solicitor as being exceptional. But what if the person dealing with the client is unrepresented? Might this result in the client's solicitor owing a duty in a circumstance where no such duty would be owed to a represented third party? In the Canadian case of *Tracy v Atkins* (1980) 105 DLR (3d) 632, the British Columbia Court of Appeal did hold a solicitor under a duty to an unrepresented third party but before any general conclusion can be based on the case, its facts require careful analysis.

In *Tracy*, the solicitor's client was negotiating to purchase property from the plaintiffs with the bulk of

the purchase money to be supplied by the plaintiffs and secured by a mortgage on the property. The client told his solicitor that the plaintiffs had agreed to him obtaining a further mortgage from a finance corporation and to that mortgage having priority over their own, although in fact the plaintiffs had never agreed to this. The solicitor completed the transaction according to their client's instructions. The statement of adjustments the solicitor sent to the plaintiffs did not disclose that there was a second mortgage on the property having priority over their own. The client defaulted in payment and the plaintiffs suffered considerable loss when it transpired that after priority had been given to the corporation's mortgage, their mortgage was insufficient to secure the amount they had lent towards the purchase price. They claimed their loss from the solicitor claiming that he owed them a duty of care.

The plaintiffs were unrepresented and the significance of this in leading the Court to the conclusion that a duty was owed is clear from the judgment of Nemetz CJ

> Not in every case will a solicitor be in a relationship of such proximity with an opposing party as was the case here. In the circumstances of this case, the solicitor undertook to carry out all the conveyancing including work that would ordinarily be done by the vendor's solicitor, such as registration of the mortgage back. By undertaking to do so he placed himself in the position of dealing with the plaintiff's interests at a time when he knew or ought to have known that the plaintiffs were or might be relying on him to protect those interests. In the circumstances of this case, he placed himself in "a sufficient relationship of proximity" that he incurred a duty of care to the plaintiffs.

Nemetz CJ went on to find that the duty had been broken. The plaintiffs were elderly with limited understanding of conveyancing transactions. The fact that the corporation's mortgage was given priority clearly raised the possibility of the plaintiffs suffering loss. If the solicitor had acted with care towards the plaintiffs he would have contacted them to make sure they understood the corporation mortgage had priority.

Nemetz CJ concluded his judgment by referring to the local Law Society's advice that solicitors acting for both parties to a conveyancing transaction should explain the legal effect of all relevant issues to both parties and that in most cases the solicitor should advise one of the parties to obtain independent legal advice. This last reference emphasises the special nature of the case. The Court obviously considered the relationship of the solicitor to the third party to be very close. Indeed, the Judge at first instance held that, in addition to a tortious duty of care, there was a fiduciary relationship between the parties and counsel for the plaintiffs contended throughout that the relationship was so close as to create an implied contract – a submission on which the Judges felt they did not have to rule.

Thus, it is suggested that the case does not support a general proposition that solicitors owe duties to unrepresented plaintiffs. The case is perhaps better seen as an extension of the principles governing conflict of interest in conveyancing transactions. A solicitor should take care explaining legal issues to both parties not only where he represents them both but also where one is unrepresented, de facto relying on him for all the legal work. The wider imposition of a duty to unrepresented third parties would not, it is suggested, be justified. Those dealing with a solicitor's client should normally be expected to secure their own legal representation and if they choose not to do so it should be at their risk. They should not normally be able to rely on the other's solicitor to act carefully in their interests, to "free-ride" on his expertise.

Conclusion

The cases discussed in these articles provide an interesting insight into the development of the solicitor's duty to third parties. As we have noted the problems may be complex and much may turn on the particular facts of the case. The one thing that seems clear is that *Ross v Caunters* marks the beginning rather than the end of the development. □

Transferable Development Rights

By R P Boast BA LLB, a Hamilton practitioner

Over the years town planning has become more complex in its practical effects, more important in its legal implications, and more significant in its economic consequences. The issues that town planning raises are still being debated and innovative suggestions continue to be made to deal with problems that arise. In this article the author considers one proposal to deal with the concept of "air-space". Many readers will recall that some years back the Wellington City Council sold air-space above a parking building to an entrepreneur. The James Cook Hotel was subsequently erected on, or should it be "in", the site thus made available.

Introduction

Many innovative new techniques in planning law escape the notice of the legal profession. Lawyers are accustomed to perceiving changes solely through the medium of new case law and statutes, but in planning law many advances come not in this way at all but instead by means of discussion of overseas developments in the professional town planning literature and the incorporation of such ideas in district schemes as the latter come up for review. A significant conceptual advance of this type which appeared in precisely this way was bonus or incentive zoning, pioneered in the United States in the 1960s and which made its first appearance in New Zealand district schemes a decade later. This technique is now a ubiquitous feature of New Zealand city planning and has served to transform the appearance of the central business districts of Auckland and (especially) Wellington.

A somewhat similar example of an interesting planning technique developed in the United States a decade ago which is now making an appearance, albeit tentative, in this country is the subject of this article, transferable development rights (TDR). It is a technique which poses some formidable problems but which offers new solutions to what have seemed to be insuperable difficulties besetting amenity controls. The object of this article is to explain the nature and background of TDR, including a consideration of both the difficulties and benefits attendant on its introduction into the New Zealand town planning system.

What is TDR?

The basic concept is simplicity itself. TDR makes unused air space a transferable – and even a marketable – commodity. The "development rights" are the difference between a building's actual height, and the permitted height – so that a three-storey building in an area zoned for buildings up to ten storeys obviously has unused development rights equivalent to seven storeys. The technique allows the severance of these rights from the building lot and their transferability to other lots about the city. The transferred rights may then be added on to the transferee lot *in excess of* (within limits) the floor space allowed by the planning instrument for the transferee site. The building owner is only allowed to transfer his development rights in exchange for accepting an amenity restriction (such as a control on demolition of a registered historic building), and the obvious beauty of the technique is that the owner receives compensation but at no direct cost to the community.

An example of the potentialities of the technique is conveniently afforded by the Planning Tribunal decision in *New Zealand Historic Places Trust v Wellington City Council* (1979) 6 NZTPA 538. In this case the Historic Places Trust had appealed to the Tribunal to delete a building situated at No 22 The Terrace from its register of historic buildings. The building in question was a 19th-century two-storey wooden house in central Wellington in a part of the city zoned for high-rise development, a fact which had naturally affected land values considerably.

In the absence of any compensation being available to the owner of the building, the Tribunal felt that compelling the owner to retain his building was much too harsh a restriction, and the Wellington City Council's decision was upheld, much to the dismay of the Historic Places Trust and civic and amenity groups. Under a TDR system, however, the owners of the building could have sold or transferred the unused airspace above the building as a consequence of its registration in the district scheme, and thus would have been compensated without there being any necessity for acquisition by either the Trust or the City Council.

TDR was first developed in New York City, where the world's first TDR ordinance was adopted in 1968. The New York system, as it ultimately evolved,[1] allows owners of listed historic buildings and areas of open space to transfer the unused development rights to other lots in the same ownership, provided that the transferee lot is within a certain specified distance of the transferor lot (the "adjacency restriction"). There are restrictions, too, on the amounts by which the transferred floor space may exceed the applicable height limits for any one transferee site (the amount of excess being normally referred to in the jargon of American writers on TDR as the "overage"). The New York system, or variants of it, have since been adopted in a number of other municipalities, most notably San Francisco, and has attracted enormous interest amongst legal

commentators in the United States.

Part of that interest can undoubtedly be explained by the Constitutional dimensions of land-use law in the the United States. In American law any non-compensable land-use restriction which imposes restrictions on a landowner so harsh as to amount to a *de facto* "taking" can be struck down by the Courts as unconstitutional.[2] An enormous body of case-law and commentary has been built up ever since the leading Supreme Court decision, *Pennsylvania Coal Company v Mahon* (1922) 260 US 393,[3] but there has been no real agreement on the question as to precisely when a land use control becomes so harsh as to become invalid.

TDR has been seen by a number of commentators as offering a way out of the "taking" impasse, an approach which now seems to have been sanctioned by the Supreme Court in the recent decision in *Penn Central Transport Co Ltd v City of New York* (1978) 438 US 104. In this case the Supreme Court held that the availability of TDR options meant that the plaintiffs failed in their argument that a municipal decision forbidding the construction of a tower block on top of their registered historic building (Grand Central Terminal) was invalid as an unconstitutional taking. The decision was greeted with considerable jubilation by preservation and civic organisations in the United States, since prior to *Penn Central* many ordinances or statutes seeking to preserve individual buildings had fallen foul of the "taking" clause of the Fifth Amendment and had been struck down.

The Chicago Plan

Some American commentators were critical of the New York TDR system, upheld by the Supreme Court in the *Penn Central* case, as going not nearly far enough. The most notable critic was Professor John Costonis of the University of Illinois, who in his book *Space Adrift*[4] and in a number of important articles[5] argued persuasively for the adoption of a more comprehensive system.

Costonis prepared an elaborate TDR programme for Chicago, the "Chicago Plan". The Plan's most innovative feature was the development rights "Bank" administered by the City itself, comprised of a surplus of development rights accumulated initially by purchase and from buildings in City ownership. Under the Plan the City sells at a profit development rights to owners of plots in designated high-rise transferee districts, who would have to purchase the rights from the Bank if they wished to exceed applicable bulk and density controls. The Chicago Plan also involves the deliberate tailoring of building height controls to ensure a buoyant market for the rights – Professor Costonis having no qualms whatever about municipalities deliberately using zoning as an instrument of policy.

The Chicago Plan, the ultimate TDR system, has in fact been received sceptically in the United States. The Plan has not been put into operation in Chicago, and the only city that has shown itself willing to give the Plan a try is Honolulu. Part of the explanation for the lack of enthusiasm is the problem of finding the funds necessary to start up the Bank by purchasing unused development rights. In fairness to Professor Costonis the explanation may also lie in part with simple local authority conservatism.

The Limits of Land-Use Control

A neglected but important issue underlying all planning law relates to the extent to which a landowner can have his activities restricted in the community interest without compensation being available. In New Zealand the question lacks the Constitutional dimensions of the "taking" issue in the United States, and there is no equivalent body of case law grappling with the question as to when controls become so harsh or oppressive as to require just compensation. Even so, the underlying issue in both jurisdictions is precisely the same: what controls can we, the community, expect a landowner to have to put up with for our benefit? It is surely an untenable proposition that *any* restriction ought to be compensable. It is equally untenable that compensation in all cases should involve either the removal of the restriction or acquisition of the full fee-simple interest at market value.

The elaboration of the common law of nuisance is a clear rejection of the proposition that a landowner is entitled to do anything he wants to with his property. The question is one of where the limit should be drawn. Sharp conflicts can and do arise in the New Zealand context, particularly in relation to controls on buildings of historical or architectural significance, but the law is handicapped by the total absence of some workable device to measure the level of restriction a landowner should be required to tolerate.

In the United States, despite the absence of academic and judicial consensus on the "taking" issue, it is clear that a landowner's right to compensation for restrictions imposed on him for the public benefit has very definite limits. The test that has been applied by many Courts and which has received the sanction of the Supreme Court in the *Penn Central* decision is that of the "reasonable return". Mere restriction is not itself compensable – it must be such as to frustrate a landowner's legitimate expectations on his investment.

In *Penn Central* the availability of the TDR options was seen as relevant to the issue of whether the landowner was being prevented from earning a reasonable return. A problem with devising TDR ordinances in the New Zealand context is the absence of any agreed formula (such as the reasonable return test) to measure the adequacy of the compensation provided by TDR in any given case. How is the Planning Tribunal to decide whether the exercise or the opportunity of exercising TDR options provides adequate compensation in the face of a total absence of any agreed criterion as to the acceptable limits of land use control?

TDR in New Zealand

The first planning document to tentatively explore TDR in New Zealand, as far as the writer is aware, was the Auckland City *Central Area Plan*, prepared by the Auckland City Council's Central Area Study Team and published in 1974. At p 45 of the Plan it is stated:

> The Council has investigated schemes whereby air rights may be traded from one property to another. This facility is seen to be particularly beneficial in the preservation of more old buildings of historic or architectural merit; owners would be encouraged to retain some older buildings and upgrade the structures to meet current requirements if financially compensated by the sale of any unused site potential under the

present provisions.

The *Central Area Plan*, however, shied away from making any more specific TDR provisions because of the many difficulties involved. In particular, concern was expressed about the resultant complexity of land titles.

Other local authorities went a little further. Two centres, Hamilton and Christchurch, devised TDR ordinances for the respective Second Reviews. In the case of Hamilton the proposed TDR ordinance, designed to effect sunlight retention in Garden Place and to preserve buildings of historic and architectural significance (far from plentiful in Hamilton) was not subsequently included in the operative scheme. Christchurch, however, has pressed on, and since no objections were received the proposed ordinance will be included in the operative scheme.

Ordinance IX.1 (6) of the 1979 Christchurch Second Review provides as follows:

> Where the owner of any land specifically identified in Appendix J also owns other land in close proximity to the land identified, applications for floorspace in excess of that which is permitted as of right may be favourably considered if some legally binding arrangement is made to ensure the long-term preservation and maintenance of the listed building on the specifically identified land. The site occupied by the listed building would also be required to be rezoned pursuant to a change to the Scheme at a consequently lower plot ratio.

This particular TDR ordinance resembles the New York ordinances upheld by the Supreme Court in the *Penn Central* decision. It applies only to situations where the owner of the protected building also happens to own land elsewhere in the city to which he wishes to transfer the development rights: transferor and transferee lots are required to be in the same ownership. There is, too, an adjacency limitation – the transferee lot must be in "close proximity" to the identified historic building. That this combination of circumstances is likely to occur very often in Christchurch seems doubtful.

Finally, Ordinance 21.25 of the Proposed Auckland Regional Planning Scheme, publicly notified on 17 May 1982, is a clear recommendation that municipalities within the area of the ARA consider adopting TDR as a means of providing compensation for amenity controls. The ordinance states:

> If the community wishes to preserve a building then it must expect to compensate the owner for any unreasonable loss suffered as a result. Various means of achieving this should be considered, including rates remission, tax incentives, low-interest or suspensory loans for restoration, transference of development rights, and grants.

Drafting TDR Ordinances

If municipalities in the Auckland region heed the ARA's suggestion to experiment with TDR ordinances, those responsible for preparing the appropriate district scheme provisions will firstly have to consider the following issues:

(i) Any TDR ordinance must endeavour to define transferor and transferee lots and the relationships that are to exist between them (ie, whether the lots have to be in the same ownership, whether they are required to be adjacent to one another, and if so, how adjacent they ought to be).

(ii) A decision must be made on the limits of the excess over existing heights or floor area ratios permissible for transferee sites: whether the limits can be exceeded by 10, 15 or 25 percent, for example. Obviously this matter of the "overage" must largely depend on the existing zoning of the transferee lot. An approach that could be considered is the Chicago Plan method of delimiting certain transferee districts.

(iii) The transferability option will have to be accompanied by some effective preservation restriction. For buildings of historic or architectural significance there are two possible alternatives: a preservation notice issued by the Historic Places Trust pursuant to the Historic Places Act 1980 and Part VIA of the Town and Country Planning Act 1977, or alternatively by using the common practice of scheduling or listing the building in the district scheme. Both these techniques have their own disadvantages, in that while the procedures for issuing a preservation notice are almost unbelievably cumbersome[6] the legal effect of registering a building or object in a district scheme is quite obscure and in some circumstances may be ultra vires.[7] Whatever the source of the restriction, ensuring that it can be subsequently administered in such a way as to take account of the

Crime fighting

Over the last three decades, American police departments have pursued a strategy of policing that narrowed their goals to "crime fighting," relied heavily on cars and radios to create a sense of police omnipresence, and found its justification in politically neutral professional competence. The traditional tasks of the constable – maintaining public order, regulating economic activity, and providing emergency services – have been de-emphasised, and those of the professional "crime fighter" have increased. Joe Friday's polite but frosty professionalism ("Just the facts, Ma'am") is a perfect expression of the modern image.

The concrete experience of citizens exposed to this strategy of policing is different from what the reformers had imagined. Officers stare suspiciously at the community from automobiles, careen though city streets with sirens wailing, and arrive at a "crime scene" to comfort the victim of an offence that occurred 20 minutes earlier. They reject citizen requests for simple assistance so that they can get back "in service" – that is, back to the business of staring at the community from their cars. No wonder so many citizens find the police unresponsive. Officers treat problems which citizens take seriously – unsafe parks, loud neighbours – as unimportant. And when a group of citizens wants to talk about current police policies and procedures, they are met by a "community relations specialist".

Moore and Kelling
The Public Interest (1983)

TDR option is obviously vital. In the case of the preservation notice procedure this would require a change to the provisions of Part VIA of the Town and Country Planning Act giving the Tribunal the power to take TDR options into account when preservation notices are challenged by landowners.

Planning Perspectives

TDR will obviously not work if there is no market for the development rights. To an extent this is obviously a matter beyond the control of local government, as the prerequisite of a reasonably buoyant building market can hardly be brought about by local legislation. However, local authorities can play a part in creating a market which will at least assist in making TDR a success — by making certain that bulk and density limits are not set at such high levels that the potential air space that can be absorbed by the market is already more than provided for. Total bulk allowed by the zoning ordinances must obviously be less than the total market demand for floorspace in the inner city.

If adjacency limits are too narrowly restricted, the difficulty may be created that an old building may only be preserved at the expense of being dwarfed by surrounding tower blocks. Another important aspect of the planning consequences of TDR relates to the determination of the percentage by which any one building may exceed the applicable bulk and density controls. Too high a figure could mean that new buildings on transferee sites are too large, create as a consequence excessive demands on urban services, and are generally visually and environmentally unwelcome. Too low a figure could equally well mean that there is little demand for the extra bulk and density, and thus that the owner of the transferor building will have difficulties getting rid of all his unused airspace.

TDR poses therefore an abundance of difficulties. Despite these problems, it needs to be remembered that TDR does not — unlike bonus zoning incentives — create any additional floorspace at all: it merely *redistributes* it. It thus puts far less of a strain on the urban infrastructure than does incentive zoning — and the latter technique has now been adopted by all main New Zealand cities.

Some Suggestions

For all its attendant difficulties TDR offers the single compelling advantage that it offers a means of making the building development process generate the resources to protect old buildings and areas of open space. The full implementation of a TDR system would require a minor legislative change to Part VIA of the Town and Country Planning Act, but could otherwise quite easily be accommodated within a Council's power under s 76 of the Act to grant dispensations and waivers of height, bulk and location requirements.

In the writer's view, both Auckland and Wellington (the centres where TDR is most likely to be effective) should adopt a TDR system. It is hoped that both centres will adopt ordinances a little less restrictive than the Christchurch ordinance which, it will be recalled, confines TDR options to adjacent parcels in the same ownership. It should at least be broadened to allow for the sale of development rights from the owner of a protected building or space to other building owners.

Whether the ultimate in TDR programmes, the "Chicago Plan" of Professor Costonis, with its development rights "Bank", is a feasible option for New Zealand cities seems unlikely. Apart from Honolulu no American city has shown any disposition to put the Chicago Plan into operation because of the financial, and perhaps political, risks involved; and doubtless New Zealand local authorities would have similar misgivings. It was the restrictive New York ordinances which received the sanction of the Supreme Court in the *Penn Central* decision.

The real question, however, which admittedly remains unanswered, is that of how effective the New York variety of TDR really is in empirical terms: how many old buildings is it actually going to save? TDR is not widespread enough even in the United States to allow any realistic predictions to be made. Costonis may be shown to be right in his view that the number of situations in which older buildings such as Grand Central Terminal will actually be safeguarded due to New York-style TDR ordinances is comparatively insignificant. Until this is shown to be the case, a restricted TDR system — although preferably not as limited as the Christchurch ordinances — deserves experimentation in New Zealand. □

1 For a detailed treatment of the evolution of the New York ordinances dealing with TDR see Marcus, "Air Rights Transfers in New York City", 36 *Law and Contemporary Problems* 372.

2 The Constitutional basis for this doctrine is the famous "taking" clause of the Fifth Amendment: ". . . nor shall private property be taken for public use without just compensation". American case law has concentrated on the meaning of the word "taken" and has evolved the concept that overly harsh land use controls may constitute a *de facto* "taking" and are invalid unless "just compensation" is available.

3 Opponents of harsh land use regulation have continued to rely ever since on Justice Holmes' majority opinion, and proponents of amenity controls on Justice Brandeis' equally celebrated dissent. For a guide to the whole issue, see generally Bosselman, Callies and Banta: *The Taking Issue: An Analysis of the Constitutional Limits of Land Use Control*, Council on Environmental Quality, Washington DC, 1973.

4 *Costonis: Space Adrift: Landmark Preservation and the Marketplace*, University of Illinois Press, Urbana, Ill, 1974.

5 See especially Costonis: "The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks", 85 *Harvard Law Review* 574.

6 See Historic Places Act 1980, ss 36-38; Town and Country Planning Act 1977, ss 125A-H.

7 See *New Zealand Historic Places Trust v Wellington City Council* (1979) 6 NZTPA 538, 540. See also *Regent Theatre Co Ltd v Dunedin City Council* (1971) 4 NZTPA 101; *Arundale Centre Incorporated v Waitemata County Council* (1972) 4 NZTPA 345; *Trustees of the Christchurch Club v Christchurch City Council* (1977) 6 NZTPA 235.

Commerce and manufactures can seldom flourish long in any state which does not enjoy a regular administration of justice, in which the people do not feel themselves secure in the possession of their property, in which the faith of contracts is not supported by law, and in which the authority of the state is not supposed to be regularly employed in enforcing the payment of debts from all those who are able to pay. Commerce and manufactures, in short, can seldom flourish in any state in which there is not a certain degree of confidence in the justice of government.

— Adam Smith
The Wealth of Nations (1776)

The protection of confidential and commercially valuable information I

By L L Stevens, BA, LLB(Hons)(Auck), BCL(Oxon), an Auckland practitioner

This article and the one to follow in the next issue of the New Zealand Law Journal *deals, with the operation of the relevant withholding provisions of the Official Information Act 1982 and their application to proceedings under the Commerce Act 1975 and information supplied under the Overseas Investment Act 1973.*

Introduction

The long title to the Official Information Act 1982 ("the OIA") heralds "an Act to make official information more freely available, to provide for proper access by each person to official information relating to that person, to protect official information to the extent consistent with the public interest and the preservation of personal privacy, to establish procedures for the achievement of these purposes . . . ". Such legislation marks a dramatic shift away from a body of law, epitomised by the Offical Secrets Act 1951, which provided that no information was to be disclosed by public servants unless such disclosures was authorised. By virtue of s 5 of the OIA, official information is made the subject of a principle of availability. The rule is that official information "shall be made available unless there is good reason for withholding it". Accordingly, it is vital for those supplying confidential or commercially valuable information to government departments, Ministers or organisations to know how such information may be protected from disclosure to competitiors or other third parties.

This paper will consider the relevant withholding provisions of the OIA and examine how commercial enterprises may seek to protect such information. Particular reference will be made to proceedings under the Commerce Act 1975 and applications under the Overseas Investment Act 1973. It is beyond the scope of the paper to consider the political process (including the reporting in 1980 by the Danks Committee on official information) which resulted in a change in the law from a presumption of secrecy to one which gives access to official information unless good reason exists to withhold it. Neither is it intended to debate the policy issues behind such a change in direction. For a discussion of the early operation of the OIA and comments upon the competing policy factors, see W D Baragwanath, *The Official Information Act: A Real Change in Direction?* 1984 NZ Law Society Conference Paper; see also the comments on the policies underlying the OIA in the decision of the Court of Appeal in *Fletcher Timber Ltd v Attorney-General* (unreported, CA No 120/83, judgment 18 April 1984).

Consideration of the means by which confidential and commercially valuable information may be protected is timely in view of the significant changes made by the Commerce Amendment Act 1983 which came into force on 1 April 1984. These changes resulted inter alia in information supplied to the Commerce Commission being treated as "official information". A review of the amendments to the Commerce Act is also appropriate, because the changes to the law necessitate a re-examination of certain parts of the law discussed in the writer's article on *Confidentiality Orders Under the Commerce Act 1975,* [1981] NZLJ 479 and 544.

It is proposed to deal with the following questions:

(a) The application of the provisions of the OIA to:
  (i) the Examiner of Commercial Practices;
  (ii) the Secretary of Trade and Industry;
  (iii) the Commerce Commission; and
  (iv) the Overseas Investment Commission.
(b) Grounds for refusing requests for official information.
(c) What information ought properly be characterised as "confidential" or relating to "competitive commercial activities"?
(d) What steps may be taken to prevent disclosure of such information to third parties?

A consideration of these matters will reveal a number of areas of difficulty concerning those parts of the OIA dealing with confidential and commercially valuable information. In particular, one is left in doubt as to whether the Legislature has done enough, both in substantive and procedural terms, to ensure that legitimate commercial interests are adequately protected.

The application of the provisions of the OIA to the bodies under consideration

The term "official information" is defined in s 2 of the OIA to mean inter alia any information held by:

(a) A government department named in Part I of the first Schedule to the Ombudsmen Act 1975 (other than the Legislative Department and the Parliamentary Counsel Office); or
(b) A Minister of the Crown in his official capacity; or
(c) An organisation.

"Information" is itself not defined. In the context of the OIA it extends to cover both documentary and unwritten information. Section 2 provides a very wide definition of the term "document".

The term "organisation" is defined to include an organisation named in Part II of the First Schedule to the Ombudsmen Act 1975, or named in the First Schedule to the OIA. It is of interest from a commercial point of view to note that organisations listed in the latter schedule include the Development Finance Corporation of New Zealand, the Industries Development Commission, the Reserve Bank of New Zealand and the Securities Commission.

It is to be observed that, in determining what constitutes "official information", generally the actual nature of the information is irrelevant. The important test is simply whether the information is in the possession of a government department, Minister, or one of the name organisations.

(i) *The Examiner of Commercial Practices ("the Examiner")*

The Examiner is appointed under s 18 of the Commerce Act. By virtue of s 18(1)(a) the Examiner is "an officer of the Department [of Trade and Industry]". Section 2(4) of the OIA provides that:

> Information held by an officer or employee of a Department or organisation in his capacity as such an officer or employee or in his capacity as a statutory officer (other than information which he would not hold but for his membership of a body other than a Department or organisation) shall, for the purposes of this Act, be deemed to be held by the Department or organisation of which he is an officer or employee.

Accordingly, any information supplied to the Examiner pursuant to proceedings under the Commerce Act is deemed to be held by the Department of Trade and Industry and is therefore official information under the OIA.

(ii) *The Secretary of Trade and Industry ("the Secretary")*

The Secretary is also an officer of the Department of Trade and Industry. It follows that the deeming provisions of s 2(4) of the OIA apply, so that submissions made to, and other information held by, the Secretary constitute offical information.

(iii) *The Commerce Commission*

The Commerce Commission was not originally included in the First Schedule to the OIA. Neither was it specified in the First Schedule to the Ombudsmen Act. However, s 44(3) of the Commerce Amendment Act 1983 amended the OIA by inserting in the First Schedule thereto the term "Commerce Commission". Therefore, from 1 April 1984 any information held by the Commerce Commission is official information.

(iv) *The Overseas Investment Commission*

The Overseas Investment Commission is one of the organisations named in the First Schedule to the OIA. Thus, any submissions made to, or other information held by, the Commission constitute official information.

Grounds for refusing requests for information

Requests for access to official information of the kind under consideration are made under Part II (s 12) of the OIA. Requests for access to other types of official information are dealt with in Parts III (access to certain documents) and IV (Access to personal information) of the Act. Section 12 provides that a request for official information may be made by a New Zealand citizen, a permanent resident of New Zealand or a body corporate which is incorporated in New Zealand. There are no other restrictions upon the class of persons which may seek access to official information, although the status of the applicant may well be a relevant factor when considering the ground for withholding information set out in s 9(2)(k) of the OIA.

Once a request is made, a decision must be made by the relevant government department, Minister or organisation as soon as reasonably practical whether the request will be granted (under s 15) or refused (under s 18). Apart from the "good reasons" for withholding official information outlined in ss 6 to 9 of the OIA (some of which will be referred to below), there are also a number of practical reasons, described in s 18, which effectively increase the exemptions to the principle of availability.

Requests can be rejected if, for example, the information will soon be publicly available; or the document concerned does not exist or cannot be found; or the information cannot be produced without "substantial" collation or research; or the body concerned does not have the information and does not believe any other department or organisation holds it; because the request is frivolous or vexatious or the information requested is trival. Where a request is refused there is an obligation pursuant to s 19 on the relevant body to give reasons for refusal.

Reference will now be made to the relevant parts of the withholding provisions of the OIA which relate to the protection of confidential and commercially valuable information. In this context, the conclusive reasons stipulated in s 6 (eg, prejudice to the security and defence of New Zealand) and the special reasons in s 7 (information relating to the Cook Islands, etc) do not require discussion. Consideration will then be given to how disclosure of official information may be restricted or regulated under the Commerce Act.

(a) *Refusing disclosure under the OIA*

Reference has already been made to the principle of availability under s 5, which provides that official information shall be made available "unless there is good reason for withholding it".

Section 8(1)

This section of the OIA sets out three "special reasons" for withholding offical information related to competitive commercial activities. This section provides:

> Good reason for withholding official information exists, for the purpose of section 5 of this Act, if the making available of the information could reasonably be expected –

(a) To prejudice significantly the competitive commercial activites of the Crown or any Department or any organisation or any subsidiary of any organisation; or
(b) To interfere significantly with contractual or other negotiations related to the competitive commercial activities of the Crown or any Department or any organisation or any subsidiary of any organisation; or
(c) To prejudice the supply of similar information, or information from the same source, where –
  (i) The information relates to competitive commercial activities; and
  (ii) The information was supplied in confidence to the Crown or any Department or any organisation or any subsidiary of any organisation; and
  (iii) It is in the public interest that similar information or information from the same source should continue to be supplied.

Paragraphs (a) and (b) are restricted to competitive commercial activities of the Crown or a government department. Paragraphs (c) is not so limited and is therefore likely to be one means by which commercial enterprises will seek to protect commercially valuable information supplied by them to government departments and organisations. The interpretation and scope of s 8(1)(c) has yet to be considered by the Courts.

Commentators appear to have assumed that this provision will protect information of the kind under consideration. For example, the PSA Research Foundation Paper No 8 contains the following statement: "Under section 8(1)(c) of the [Official Information] Act, for instance, if information on 'competitive commercial activities' is supplied by a firm 'in confidence' to a department, then it is 'good reason' for withholding it." The difficulty with this bald comment is that it assumes compliance with the third of the three requirements set out in para (c). Moreover, it does not answer the vital question of what constitutes "competitive commercial activities".

The three cumulative statutory requirements of s 8(1)(c) merit detailed consideration. The first requirement is that the information relates to "competitive commercial activities". This phrase is not defined in the Act. The question of what information falls within this category is such an important topic that it will be discussed separately in s 4 below.

The second of the statutory requirements is more straightforward. It requires that the information be supplied "in confidence to the Crown or any Department . . .". The term "in confidence" is also not defined in the OIA. Some guidance as to how the words will be interpreted may be drawn from the law relating to the equitable action of breach of confidence. One of the elements of this action is that the information in question was communicated in circumstances importing an obligation of confidence. This element has been described in Copinger and Skone James on *Copyright* (12 ed, 1980) para 725, as follows:

> However secret and confidential the information may be, there can be no binding obligation of confidence unless the information is communicated or acquired in circumstances importing an obligation of confidence. It is difficult to deduce from the decided cases any precise, comprehensive test for determining whether the circumstances of a particular case import an obligation of confidence. One general test which has been suggested is that a confidential relationship exists if the circumstances are such that any reasonable man, standing in the shoes of the recipient of the information, would have realised that upon reasonable grounds the information was being given to him in confidence. For example, it would be relatively easy for a plaintiff to establish a confidential relationship where information which is of commercial or industrial value is communicated during business negotiations with a view to a joint venture or to the commercial exploitation of the information by one party for, or with the co-operation of, the other party.

If a similar test were to be applied to this statutory requirement, it would be important for those supplying confidential or "competitive commercial" information to a government department or organisation to draw attention to the confidential nature of the information at the time of supply. It seems that, if the information was marked with the words "COMMERCIAL – IN CONFIDENCE", or some similar notation, the requirement would be held to have been satisfied. Even if the material were not so marked, but it was plain from all the circumstances that the information had been supplied "in confidence", it is again likely that the requirement of confidence would be met.

This leaves the third requirement namely, that it is "in the public interest that similar information or information from the same source should continue to be supplied". It is submitted that this requirement is directed to the public interest in the effective administration by the relevant government department, Minister or organisation. It would not encompass the broader public interest which might, as a matter of social policy, lie behind the statutory regime or area of government being administered.

The difference may be illustrated by way of example from the Commerce Act. Is it in the "public interest" that companies should continue to supply information to government bodies for the purpose of effecting a take-over or obtaining exemption from price controls? In the writer's view, the "public interest" requirement in s 8(1)(c)(iii) would assume that it is socio-economically desirable that mergers, takeovers and price control be the subject of government regulation. Therefore, the focus of the "public interest" requirement is to ensure that the bodies investigating such matters continue to be supplied with all relevant information so that such matters can be fully investigated and the Commerce Act properly administered.

It is also a necessary requirement for the application of s 8(1)(c) that disclosure of the information could reasonably be expected to "prejudice the supply of similar information . . .". Plainly, one category of persons who would be interested in information relating to the competitive commercial activities of the supplier of the information, includes competitors of the supplier. If suppliers of information knew that

valuable commercial information could be disclosed to competitors they would certainly be reluctant to make full and proper disclosure of their affairs to one of the investigating authorities under the Commerce Act. In this way the supply of such information would clearly be at risk.

While the precise scope of the wording of s 8(1)(c) is open to some debate, it would seem that provided commercially valuable information is clothed with confidentiality at the time of its release, such information should be protected from disclosure by the body to whom it is supplied. Although the grounds for withholding such information set out in s 8 are described as "special reasons", as opposed to the "conclusive reasons" identified in s 6, it seems that, provided the requirements of s 8(1)(c) are satisfied on the facts, there will exist an absolute ground upon which a government department or organisation must refuse disclosure. A different approach is required by s 9 which will now be discussed.

Section 9

This section contains a number of "other reasons" for withholding official information. Where one of the provisions of subs (2)(a) to (k) inclusive applies, then good reason for withholding official information exists unless 'in the circumstances of the particular case, the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available". Thus, the body holding the information must carry out a balancing of the competing interests requiring withholding on the one hand and disclosure in the public interest on the other.

Possible grounds for the protection of commercially valuable information may arise under s 9(2)(b) and (k). The former provides that information may be withheld if such withholding is necessary to:

(b) Protect information supplied in confidence to any Minister of the Crown or to any Department or organisation, or by or on behalf of the Crown or of any Department or organisation to any person outside the service of the Crown or of the Department or organisation, –
  (i) Where the making available of that information would be likely to prejudice the supply of similar imformation, or information from the same source, and it is in the public interest that such information should continue to be supplied; or
  (ii) Where the protection of that information is otherwise in the public interest.

This paragraph contains similar requirements to those contained in s 8(1)(c). It is not, however, confined to information relating to "competitive commercial activities", but extends to cover any information which has been "supplied in confidence". Moreover, the public interest factors are not limited to the desirability of a continued supply of the information in question, but rather extend to any case where "the protection of information supplied in confidence" is "otherwise in the public interest".

This ground no doubt reflects the wording of the long title which envisages the protection of official information "to the extent consistent with the public interest". However, the problem arises that the concept of public interest in this context is not defined in the Act. If one looks at other reasons contained in s 9(2), one begins to gain some insight into the matters which could fall within the ambit of public interest. Examples are avoiding prejudice to measures protecting the health or safety of members of the public (para (c)) or avoiding prejudice to the substantial economic interests of New Zealand (para (d)). Notwithstanding this, the concept of being "otherwise in the public interest" is one which could cover a multitude of reasons. How government departments, Ministers or organisations will interpret this paragraph remains a matter of conjecture.

Even if it is successfully argued that protection of the information is in the public interest, there must still be a balancing to determine whether, as stated in s 9(1), "the withholding of that information is outweighed by *other considerations* which render it desirable, in the *public interest,* to make that information available". This aspect of s 9 is discussed in the judgment of McMullin J, in the *Fletcher Timber Ltd* case, (supra). The result is that an undefined public interest in favour of protection is to be weighed against an equally elusive public interest requiring disclosure.

In leaving protection to apply in such circumstances, the Legislature has created difficulties for both government departments, Ministers or organisations and the suppliers of official information. The decision as to the applicability or otherwise of various withholding provisions, which might be used to protect commercially valuable information, is to be made by government departments, Ministers or organisations all of whom will inevitably have far less interest than the supplier in whether the information should be disclosed.

This factor points to an area of considerable concern, namely, how the supplier of the information can become aware that an application has been made by a third party to a government department, Minister or organisation for access to his (the supplier's) information. One of the major problems for suppliers of information is the fact that under the OIA, there is no procedure whereby the supplier of information will receive notice from the government department or organisation to whom the information was supplied, if and when a request for that information is received from a third party. This is a matter which will be addressed in s 5 below.

Section 9(2)(k) provides a further "good reason" for withholding official information if such withholding is necessary to:

(k) prevent the disclosure or use of official information for improper gain or improper advantage.

The terms "improper gain" or "improper advantage" are not defined in the Act. It would seem, however, that they may be wide enough to encompass the situation where a person seeks from a government department, Minister or organisation access to confidential information relating to the commercial activities of a competitior. It could be argued that the release of such information to the person seeking access to it would be an abuse of the provisions laid down in the OIA. Again, this category is subject to the balancing test identified in s 9(1). It is also subject to the difficulty that the supplier of the information will, unless notified by the government deparment, Minister or organisation

(and as noted above there is no such obligation under the OIA), not be aware that a request for information to his (the supplier's) possible prejudice has been made. Accordingly, the withholding provisions described above are not without difficulties of both interpretation and application. It remains to be seen whether the meaning and scope ascribed to these provisions will allow adequate protection of the commercial interests they were designed to safeguard.

(b) *Provisions in other enactments restricting or regulating disclosure of information*

The OIA is expressly subject to the provisions of any other enactment which restricts or regulates the release of official information. Section 52(3) of the OIA states that:

> . . . . nothing in this Act derogates from –
> (a) Any provision which is contained in any other enactment and which authorises or requires official information to be made available; or
> (b) Any provision which is contained in any other Act of Parliament or in any regulations within the meaning of the Regulations Act 1936 (made by Order in Council and in force immediately before the 1st day of July 1983) and which –
> (i) Imposes a prohibition or restriction in relation to the availability of official information; or
> (ii) Regulates the manner in which official information may be obtained or made available.

This provision has relevance with regard to the Commerce Commission in that ss 11A and 15(2)(c) of the Commerce Act 1975, which enable the Commission to make confidentiality orders, plainly fall within the ambit of s 52(3)(b)(i). It is of interest to note that the Securities Commission may also make confidentiality orders in respect of evidence or matters "of a confidential nature" pursuant to s 19(5) of the Securities Act 1978.

Before giving further consideration to the confidentiality provisions of the Commerce Act, reference should be made to s 44(2)(a) of the Commerce Amendment Act 1983 which repealed s 19 of the Commerce Act. Section 19(1) formerly imposed on each member of the Commission, the Examiner and the Secretary, an obligation to maintain the secrecy of all matters coming into their knowledge when carrying out their respective functions under the Act, except where disclosure was necessary for the purposes of carrying the Act into effect.

By virtue of the repeal of s 19, that general obligation for secrecy no longer exists. Accordingly, in the absence of any confidentiality order made by the Commerce Commission, the disclosure of information supplied to the Examiner, the Secretary or the Commerce Commission will now be governed by the withholding provisions of the OIA. Thus, official information will be subject to the principle of availability unless one of the withholding provisions discussed in the previous section applies to it.

Given the limitations which apply to the relevant withholding provisons, it could be extremely important to obtain appropriate confidentiality orders under the Commerce Act. In this area, significant changes have been introduced by the Commerce Amendment Act 1983. Section 9 of the Commerce Act 1975, which required the Commission generally to hold its hearings in public, has now been repealed. In its place there has been enacted a new s 11A which provides as follows:

> 11A. *Inquiries and investigation of Commisson* – (1) In the exercise of its functions under section 11(1) of this Act, the Commission may hold such inquiries and may conduct such investigations as it thinks fit.
> (2) Without limiting the generality of subsection (1) of this section, the Commission may, if it thinks fit, hold public hearings in respect of any application or other matter before it, but it shall not be obliged to do so in any case.
> (3) The Commission may –
> (a) Order that any matter or class of matters be determined in private, either as to the whole or any portion thereof:
> (b) Make an order prohibiting the publication of any report or account of the evidence at any inquiry or of any other proceedings (whether conducted in public or in private), either as to the whole or any portion thereof:
> (c) Make an order prohibiting the publication of the whole or part of any books or documents produced to the Commission.
> (4) Every person commits an offence against this Act who acts in contravention of any order made by the Commission under paragraph (b) or paragraph (c) of subsection (3) of this section.

The present position may therefore be summarised by observing that the Commerce Commission is now empowered to make orders that:

(i) the hearing be held in *private:* under s 11A(2) the Commission has a complete discretion whether or not to hold meetings in public or in private;
(ii) any matter or class of matters be determined in private: s 11A(3)(b);
(iii) the publication of any report or account of the evidence at any inquiry or of any other proceedings (whether conducted in public or in private), either as to the whole or any portion thereof be prohibited: s 11A(3)(b);
(iv) the publication of the whole or any part of any books or documents produced to the Commission be prohibited: s 11A(3)(c).

In addition, the Commission may give such directions as it thinks fit for the filing, production or inspection of any document relating to any matter that is to be considered at the hearing: s 15(2)(c).

The Commerce Commission is required by s 130A to maintain a register containing reports, evidence, submissions and other documents given to the Commission under the Act. The Secretary is also obliged to maintain a register containing brief particulars of orders, approvals or determinations, together with particulars of certain information submitted to or obtained by the Secretary. However, by virtue of s 130A(3) the maintaining of such registers is subject to any confidentiality order made by the Commerce Commission under s 11A(3) of the Act.

The relevant statutory framework

under the Commerce Act is completed by reference to s 130 (substituted by s 43(1) of the Commerce Amendment Act 1983). This provides that:

> (1) The Commission shall from time to time publish, or make available for publication, all decisions, determinations, recommendations, and reports made by the Commission under any of sections 15, 22, 23A, 24 to 26, 28 to 30, 41, 46, 64 to 66, 76, 81D, 81H, and 104 of this Act.

Clearly this provision, which is an unqualified one, requires that the public be informed of the Commerce Commission's determinations and the reasons therefor. This applies whether the inquiry or hearing has been public or private.

In a recent decision of the Commerce Commission in *Re Takeover Proposal between Visionhire Holdings Ltd and Sanyo Rentals Ltd* (decision No 81, 31 May 1984) the sections of the OIA and the Commerce Act under consideration were discussed. The Commission held (at para 6) that:

> In the Commission's view these provisions of the two Acts recognise that in assessing whether or not to make orders of confidentiality which extend beyond the date of its decision on the substantive issues under its own act, the Commission must, in relation to competitive commercial information, weigh the conflicting principles of public interest:
>
> (a) On the one hand, the need to protect Applicants from prejudice due to misuse of the information by others and to encourage Applicants to provide information which is essential or desirable to its deliberations; and
>
> (b) On the other hand, the need to ensure that, even if the hearings and its deliberations are private, the public interest as determined by the Commission is made known to the public for the benefit of the community at large and to create a body of law or practice relating to such matters.

The protection available under the confidentiality provisions of the Commerce Act makes it desirable that timely applications should be made to the Commerce Commission for appropriate confidentiality orders. In this regard, a prescribed form of notice has recently been issued by the Commerce Commission in respect of applications for consent to merger or takeover proposals coming within the Third Schedule to the Act. This notice makes specific reference to the type of confidentiality orders which may be required.

First, the notice raises the issue of whether confidentiality is claimed by any participant for the fact that the notice of merger or takeover is made. An order of this type was made by the Commerce Commission in the *Visionhire Holdings Ltd* case, (supra). The confidentiality order was made pursuant to s 11(3)(c) prohibiting publication of the whole of the application for the period of the Examiner's investigaton. In other cases, where it is necessary for the Examiner to disclose the fact of the application in order to carry out his investigations properly, a more limited order may be made.

Secondly, the notifying participant must indicate whether confidentiality is claimed in respect of information provided in or in conjunction with the notice. In this case, the information for which confidentiality is claimed must be identified with due particularity. With regard to all applications for confidentiality orders, the reasons for seeking confidentiality must be given, as well as the time period for which confidentiality is claimed.

Finally, the confidentiality provisions of the Commerce Act do not refer to terms such as "confidential information", "commercially valuable information" or the like: neither are such terms defined elsewhere in the Act. It appears that what constitutes such information will fall to be determined by the Commerce Commission on a case by case basis. For a discussion of the relevant cases, see the writer's article "Confidentality Orders under the Commerce Act 1975", supra at 481. No doubt the Commission will in the future be guided by any case law decided under the relevant withholding provisions of the OIA. This is a vexed question which will be considered further in a subsequent article. □

Case date brackets

The desirability of continuing to use square and round brackets enclosing dates of cases in citations, was questioned last Friday by Neville D Vandyk in a lecture given at Birmingham University as their honorary professor of Legal Ethics. "With the development of information retrieval systems harnessed to computers", he said, "the time is surely ripe for English lawyers to examine critically the present method of case citation, with particular reference to the placing of the relevant year within square or round brackets. . . . In this context law publishers are laymen who must aim to satisfy the requirements of their customers, the lawyers. The initiative for any change must therefore come from the lawyers. Since 1907 at least, the Scottish legal system has run smoothly in the absence of brackets round the dates of case reports. Think of the enormous amount of print, man hours and paper which might have been saved if the English legal system has dispensed with such brackets in the last century. Pay regard to the convenience of dropping them in the near future from the viewpoint of information retrieval systems alone!"

Solicitor's Journal
11 February 1983

Justice

Men, though naturally sympathetic, feel so little for another, with whom they have no particular connection, in comparison of what they feel for themselves; the misery of one, who is merely their fellow-creature, is of so little importance to them in comparison even of a small convenience of their own; they have it so much in their power to hurt him, and may have so many temptations to do so, that if this principle did not stand up within them in his defence, and overawe them into a respect for his innocence, they would, like wild beasts, be at all times ready to fly upon him; and a man would enter an assembly of men as he enters a den of lions.

— Adam Smith
Theory of Moral Sentiments (1759)

Books

Sources of English Legal and Constitutional History

Edited by Michael Evans and R Ian Jack. Published by Butterworths (Australia), pp, 413, $NZ61.50. ISBN 0 409 49382 1.

The Western Idea of Law

Edited by J C Smith and David W Weisstub. Published by Butterworths (Canada), 685 pp, $NZ65.50. ISBN 0 409 86819 1

Reviewed By P J Downey

These two books are different in many ways, but they provide an interesting comparison. They both consist of extracts, some quite lengthy, and both are presumably intended as supplements to teaching courses, the one in jurisprudence and the other in the constitutional law of England a knowledge of which is essential to any understanding of the background to the general body of law that Australia and New Zealand, and Canada in its slightly different way, have inherited.

Sources of English Legal and Constitutional History starts with the Laws or Dooms of Ethelbert, King of Kent, of 602 and goes through to the Equal Franchise Act 1928. Since the book is compiled by two Australian academics it is a little surprising that they did not carry it through one more step to the Statute of Westminster of 1931 which technically marked the fulfilment, from the English constitutional position, of the development of the idea of responsible government to the entitlement to full independence of the one-time colonies such as Australia and New Zealand.

It is one of the oddities of the common attitude to the constitutional law and history of England, and that of Great Britain, that the legal principles and practices, the statutes and the case law, whereby Great Britain ruled such a large part of the globe, in the Americas, in Africa and in Asia is largely ignored. There were many more people affected by English law and the views of English Judges than merely those living in the British Isles. But history is necessarily always written by later generations who notice or are concerned only with those things that have survived to be still relevant for their own day and age. It is, for instance, only a matter of antiquarian interest for us now that at one time Sir Robert Stout CJ sat on the Privy Council and dealt with cases from all parts of the Empire and himself wrote the judgments on such "foreign" topics as the rites of an Indian temple and the personal attributes of a pagan God. Looking through this source book one could be forgiven for thinking that England never had an Empire – nor any troubles in Ireland.

The book contains the text of all the usual documents and many of the traditional cases. Magna Carta (1215) is printed together with the earlier Charter of Liberties of Henry I (1101), some 114 years earlier. There are excerpts from the Anglo-Saxon Chronicle and from Glanvill's Treatise (1187) which is generally regarded as the first text-book on the common law. In the Prologue to the Treatise Glanvill set out his purpose with admirable simplicity. After explaining that not all the laws of England are in writing because of their "confused multiplicity" and "the ignorance of scribes", he goes on to say:

> . . . there are some general rules frequently observed in Court which it does not seem to me presumptuous to commit to writing, but rather very useful for most people and highly necessary to aid the memory.

The times of the Tudors and the Stuarts is dealt with in detail culminating eventually in the Act of Settlement 1701. The editors print, immediately before the Parliament Act 1911, the Cabinet minute to the King advising that if, after a further election, the House of Lords continued to reject certain bills passed by the Commons, the King would create sufficient Peers to enable the government's legislation to be enacted. What makes this particulary interesting is that they include the King's diary note of his discussion of the Cabinet minute with the Prime Minister, Asquith.

The book also contains a good assortment of cases from *R v Corbet* of 1292 to *Bovill v Hitchcock* of 1868. Both of these cases interestingly enough were concerned with what might be considered procedural questions. The first related to the withdrawal of a suit to a County Court, and the latter with the alleged right to a jury trial in a civil action concerning patent rights. In their own ways these two cases show that the editors have cast their net wide in their understanding of constitutional issues.

Every selection is open to criticism for what is left out. The constraints of space and therefore of cost, are real. Even so it is surprising in this day when the question of privacy and the intrusion of officials armed with powers of entry is so much at issue, that neither *Wilkes v Wood* (1763) 19 State Tr 1153, nor *Entick v Carrington* (1765) 19 State Tr 1030 on the illegality of general warrants, are included.

Nevertheless the material selected is wide. The editors have made very little comment and by and large the documents are left to speak for themselves. The book is organised by topics of an historical nature, and is not simply chronological. There is no index, but there is a useful glossary explaining such archaic technical terms as *advowson* and *scavage*. Constitutional law students, and students of English history should find the book useful.

Finally a word must be said about the production of the book. As a publication it is attractive to look at and to handle. It is printed on ivory coloured paper in sepia coloured ink. This gives the book a certain air as of ancient parchment that makes it in itself a thing of beauty appropriate to the age and significance of its subject-matter.

The *Western Idea of Law* is a quite different sort of source book. It does

contain a few original texts but this does not constitute the main body of the work. In their introduction the editors state their attitude to law – and thus the principle that has guided their selections – as follows:

> While Judeo-Christian influences have been felt, the heritage of Western law, in terms of language, logic and archetypes, may be traced primarily to Greco-Roman scientism and patriarchy. Law is a significant description of the way in which a society analyzes itself and projects its image to the world. It is a major articulation of a culture's self concept, representing the theory of society within that culture. It is the deepest and most generalized philosophical statement that a non-revoluntary or non-anarchistic culture can make about itself. The legal experience, in its most comprehensive form, is a multi-dimensional phenomenon, wherein mythic, dramatic, rhetorical, and philosophical elements play significant roles. In the West, the philosophic dimension of law has eclipsed the development of myth, drama, and rhetoric, to the detriment of cultural harmony.

The book is not chronological in form. It is divided into four chapters on, Law and Culture, The Mythological Origins of Law, The Foundations of Western Law, and Law and the State. Within each chapter the extracts are divided up among three or four separate topics in different sections. It is unfortunate that the original source materials given are undated, nor are they indexed either under authors or subject- matter. Some original source material sometimes appears in various segments in the different sections of the book. The original material ranges from the Code of Hammurabai (c 1750 BC), the Laws of Manu (c 100 BC) through the Institutes of Justinian (529 AD), the Laws of Alfred (c 880 AD) and so on up to the Constitution of Japan (1946) and the European Convention on Human Rights (1953).

Most of the extracts in the book (and there are 173 of them varying in length from 10 or 12 lines to 10 or 12 pages) are descriptive and philosophical passages. For instance there is Donald Kagan writing for

Feminist Critique

. . . Political theory up to our own time, and including Marx, is the ideology of the male, serving the interest of the dominant sex, whose dominance is likewise assumed, and asserted, to be "natural", the dominance of those who are naturally stronger, freer from the grinding necessities of biological reality, more aggressive, more contemplative, and rational.

The fundamental problem with which traditional political theory has failed to come to grips, indeed the fundamental reality politics was devised as an escape from, is reproduction. It is precisely because of this fact that politics represents a flight from reality, and why, stripped of its sexist assumptions, it is, as we know it, incapable of providing us with a set of workable social institutions guaranteeing equality to all regardless of sex.

At its very heart politics assumes that reproduction is demeaning, that fundamental meaning and importance for man, and here I mean the term literally, cannot derive from the theory to support it, was born from a sense of the futility of the reproductive function. It was designed exclusively by men, exclusively for men, as an escape from the world of the household, the realm of the "merely" biological, of pure necessity. . . .

On the Marxist model as it stands, either women's ability to become producers will still somehow have to be fitted around their still-assumed-to-be-natural reproductive function, or the reproductive function will have to be eliminated. The fact that the latter is now a distinct possibility is what I find extremely frightening.

To the extent that women become producers, they are desexed, at least in the sense that their reproductive abilities must be totally denied. This is to return to a point made earlier, that woman's visibility within a Marxist analysis requires the severance of her identify from her reproductive abilities.

While no feminist wants her sexuality totally identified with her reproductivity, it seems too much to assume that her equality necessitates the abolition of her reproductive ability as any part of her identity. And this is a point of no small importance. With advances in technology, more and more of the reproductive function can in fact be transformed into a form of production. But to the extent that this is true, its logical outcome is the artificial production of children.

Indeed, Firestone had already suggested that the complete equality of women can only be achieved once all babies are produced artificially. Only then will that part of the reproductive function which is irreducibly the ability of women, as opposed to men, become totally obsolete and the source of even the periodic invisibility of them and their unique labour.

But why should the reproductive function have to be totally abolished in order to allow women to assume their equal place within society? Surely this represents the complete victory of the dominant sex and of the values they have enforced, namely, the utter redundancy of the female in so far as she has a unique role in the reproductive process and the utter obliteration of the reproductive function as such.

Production no longer presupposes reproduction and women no longer have a reproductive identify. Just as importantly, neither do men. Thus, full visibility within society, at least in so far as a Marxist analysis is genuinely descriptive of society, entails the destruction of our sexual difference and of at least that much of our sexual identity as rests on our differentiated reproductive abilities.

— **M G Lorenne Clarke**

"Politics and Law: The Theory and Practice of the Ideology of Female Supremacy: Or, It Wasn't God Who Made Honky Tonk Angels" in *Law and Policy* ed D N Weisstub (Toronto). Excerpted in *The Western Idea of Law.*

nine pages on Greek political thought, Roland de Vaux with eight pages on ancient Israel, Lord Denning has three pages on the changing law and Brian Tierney is given one page on Bracton and six pages on the origins of the modern authoritarian state. The breadth of the book is startling with quotations from a range of authors that includes Plato and Aristotle, the Old and New Testaments, Aquinas, Bracton, Coke, Blackstone, Jefferson, Bentham, Hegel, Marx, Vyshinsky, Hart, Rawls and Dworkin.

The final section dealing with the modern industrial state includes extracts from Djilas, Lenin, Mary Woolstonecroft, Daniel Bell, Freidrich Hayek, Ernst Cassirer, George Steiner and Erich Fromm. Certainly this is not a list that could be described as showing a narrow, technically legal approach. The book is also notable for the number of extracts dealing with aspects of law in relation to women. In this respect the most engaging title of any of the extracts must be that of M H Lorenne Clarke of Canada whose article is entitled *Politics and Law: The Theory and Practice of the Ideology of Female Supremacy: Or, It Wasn't God Who Made Honky Tonk Angels* (see excerpt in adjoining box).

Given the rich variety of the quotations it is a little surprising to note some omissions, although of course a halt had to be called somewhere. It is nevertheless surprising that there is nothing from Beccaria, Vico or Kelsen. A more serious omission is that the book does not have a section on international law which can truly be described as the great contribution of the Western legal system to the world community. There is a sense in which it can be considered the recompense made for the great era of colonialism which did so much to form international law and particularly the major human rights conventions that we now have. Space could and should have been found for some extracts from such contributors as Suarez, Grotius and Savigny; and in our time from the writings on human rights of René Cassin or Moses Moskowitz.

A New Zealander will naturally notice the substantial contributions from Canadian authors (including four from the editor and a poem from the author), and regret that no space is found for Sir John Salmond. But New Zealand is represented. There is a substantial extract relating to the Maori "law" of property. This is taken from Raymond Firth's *Primitive Economics of the New Zealand Maori*. In the light of current controversies it may be worth noting that according to Firth the grounds (if I may be permitted the pun) for land ownership include conquest and occupation as well as ancestral right!

For lateral thinkers there is an amusing misprint on p 529 in the extract from Karl Marx. He is quoting the Declaration of the Rights of Man 1791 and the text refers to the "conversation" of the rights of man instead of their "conservation". It is an appropriate transposition of letters. It is a mistake that Marx himself might so easily have made in view of his obsession with the idea of the dialectic, which is after all only an abstraction for dialogue.

One of the editors, J C Smith (not to be confused with Professor J C Smith of Nottingham, England), has an extract from an article he wrote on "The Unique Nature of the Concept of Western Law" which neatly sums up the underlying idea of this book. He writes:

> . . . [U]nlike modern law, primitive and archaic law contain few abstract or theoretical concepts. Most concepts in such legal systems derive their meaning directly from, or in terms of sensed experience. This difference can be illustrated by comparing the modern law concepts of contract and property with their closest counterparts in archaic law. While every society has a concept or concepts relating to property and commercial transactions carried out upon the basis of mutual consensus, the concepts of "ownership" and "contract" in the sense of abstract bundles of jural relations exist only in classical Roman and modern law.

This book is not a collection of passages intended for a course in jurisprudence as a university subject. It certainly is a valuable supplement to such a course. It has however a wider and more general significance. It will appeal to those with an interest in ideas, in philosophy, politics, and history. It provides a set of texts that illustrate and illuminate the law as a cultural and political reality, and that show the roots from which it has grown. □

Professional Costs

By Gray Williams from Wisconsin, USA

For the first two cases described by Mr Williams New Zealand practitioners will recognise obvious similarities with Gartside v Sheffield *[1983] NZLR 37 and* Candler v Crane Christmas & Co *[1957] 1 All ER 426.*

The recession still lingers in the Midwest despite protestations to the contrary from Washington, DC. The result of this for many professionals is that the public is less likely to use their services. The divorce rate for example, has decreased throughout the USA during the last two years as many couples have found that they are either unable financially to live apart, or, if they do live apart, they do not have available the extra money to begin divorce proceedings.

For many professionals therefore, 1983 was not a banner year. And during 1983 the Wisconsin Supreme Court handed down several decisions that are likely to compound the woes

and make professionals even more jittery in 1984. The first case, *Auric v Continental Casualty Company*, 111 Wis 2d 507, 331 NW 2d 325, involved an attorney who drafted a will and revocable trust for a client. Wisconsin requires two attesting witnesses to a will. The attorney who drafted the will, and his secretary, intended to witness the will and did in fact witness the trust. However, by some oversight, the secretary never witnessed the will.

Because of this oversight the will could not be admitted into probate and instead a previous will, properly attested, was admitted. For Mr Auric the effect was disastrous as the latter, unattested will contained a specific bequest of $25,000 to him. The prior, attested will made no such bequest.

Mr Auric sued the attorney claiming that the attorney's negligence resulted in the loss of the $25,000 bequest the testator had intended leaving him. Many attorneys felt certain that Mr Auric would fail because of the general rule that an attorney is not liable to third parties for acts committed in the exercise of his duties as an attorney.

The Wisconsin Supreme Court agreed that there was such a general rule but noted that there were exceptions to it – for example where fraud is involved. The Court added that whether a further exception should be allowed for the present factual situation involves considerations of public policy.

It is clear that imposing liability may conflict with the duty an attorney owes a client. However, balanced against that is the testator's constitutional right to make a will, and imposing liability, said the Court, implements that right. Furthermore, imposing liability will make attorneys more careful in the drafting and execution of wills. The Court concluded that lack of privity with the beneficiary of a will does not bar that beneficiary recovering from an attorney who negligently drafted or supervised the execution of a will.

Few attorneys were overjoyed by the decision particularly as liability is now allowed not only for negligent supervision of a will (as was the case in *Auric*) but also for the negligent drafting of a will. Attorneys were distressed by the thought that this case may open the way for a great many more malpractice suits.

Accountants also had their day in Court and the results for them were equally as unnerving. In *Citizens State Bank v Timm, Schmidt & Co*, 113 Wis 2d 376, 335 NW 2d 361, the accounting firm of Timm, Schmidt & Co, had prepared financial statements for a company called CFA. Citizens Bank made a loan to CFA based, in part, on the financial statements Timm had prepared. Employees of Timm later discovered the statements to be inaccurate (the errors amounted to $400,000). They informed Citizens who then called the loan due. CFA went into receivership and was liquidated.

The question, as in *Auric*, was whether an accountant can be held liable for the negligent preparation of an audit report to a third party not in privity who relies on the report. The Court held that liability should be imposed to deter such negligences and to ensure that the cost of credit will not increase because creditors have to absorb the loss attributable to an accountant's negligence.

As to the extent of an accountant's liability to injured third parties, the Court rejected as too restrictive the argument that liability should be limited to the group of persons expected to gain access to the financial information. Instead, citing Wisconsin negligence principles, the Court held that liability will be imposed on accountants for foreseeable injuries resulting from the accountant's negligent acts.

These decisions dealt a body blow to attorneys and accountants alike. Meanwhile, one of Wisconsin's best known criminal lawyers, Donald Eisenberg, was having his own problems with the legal establishment.

Eisenberg was representing a Mr Cerro on three felony drug charges. A friend of Cerro's had information in relation to a murder case which he offered to the authorities with the understanding that charges against Mr Cerro and himself would be reduced. Mr Cerro as well offered the authorities information concerning the murder case. Barbara Hoffman was later charged with murder and Mr Eisenberg began representing her as well.

A referee, a reserve judge, who investigated the charges that Eisenberg acted improperly, held that Eisenberg should not have represented Mrs Hoffman and Mr Cerro because of the conflict of interests involved. The referee recommended that Eisenberg be publically reprimanded and ordered to pay the costs of the disciplinary proceeding ($9,747.46). Both the Board of Attorneys Professional Responsibility and Mr Eisenberg appealed.

The Wisconsin Supreme Court held firstly that Eisenberg failed to decline proferred employment under circumstances that would be likely to adversely affect his independent professional judgment on behalf of another client. Secondly, they held that Eisenberg continued multiple employment when that also would be likely to affect his representation of another client. They upheld the referee's decision that Mr Eisenberg should pay the cost of the disciplinary proceeding but rather than a public reprimand, they ordered that Eisenberg's licence to practise law in Wisconsin be revoked for six months.

The decision was viewed by many as being overly severe, but if that was not enough, at about the same time a dispute broke out between the state's doctors and attorneys. The State Medical Society executive director claimed that "frivolous" law suits were being brought by "ambulance chasing lawyers" and that this had resulted in an increase in medical malpractice insurance to a point where there is now an insurance crisis.

The Wisconsin State Bar President rejected the claims pointing out that the state law allows attorney fees for frivolous cases. Other lawyers indicated that the Patient Compensation Panel which first hears medical malpractice suits, is composed of doctors, lawyers and other public members and, if there had been an increase in the amount of damages awarded, it had been with the support of the doctors on the Panel. Now the Wisconsin Academy of Trial Lawyers is seeking a Court determination on whether the Patient Compensation Panel, with two of its members being doctors, can reach an unbiased decision on a medical malpractice claim after the prejudicial statements that were made by the State Medical Society executive director.

It is possible that the law will be changed and a new system of handling medical malpractice suits instituted. For the present time the debate – or the "big lie" as the Bar President calls it – continues. It has not been an auspicious beginning to 1984. □