THE NEW ZEALAND
LAW JOURNAL
21 MARCH 1985

Sixty years on

This month marks the 60th anniversary of the first publication of *The New Zealand Law Journal.* This first issue appeared on 3 March 1925. It was originally called *Butterworth's Fortnightly Notes.* Three years later it was renamed, but without any change in format, style or content.

As circumstances and publishing fashions have changed over the years *The New Zealand Law Journal* has altered from time to time in size, in shape, in regularity, in style and in the sort of material it has published. Its essential purpose however has remained the same. This is to provide the legal profession in New Zealand with useful and interesting information on a variety of contemporary topics of a legal nature.

It is of some interest to look at the three issues that appeared during the month of March 1925, to see what the present journal has grown from. The front cover and the first few pages were given over to advertisements. These in themselves have a certain entertainment value. A full page advertisement indeed is devoted to a form of entertainment, but appropriately a very high quality form of entertainment. A, presumably, rhetorical question asks if you would enjoy entertaining Paderewski in your home and have him play on your piano. This can be achieved if you buy, from Beggs, a Duo-Art Pianola. This is of course a roll-playing instrument with "identical reproduction of technique, tone, tempo and pedalling", and "Paderewski records exclusively for this instrument". So the first readers were being encouraged to buy the 1925 equivalent of a high standard video-cassette recorder.

The format followed in the first issues was standard for some years. There was a statement of the dates and places of the Court of Appeal and Supreme Court sittings for the year; some general information about Bench and Bar of a somwhat brief and gossipy nature; some news about activities of the law societies; a book review; and a couple of letters to the editor. Most of the space was devoted to brief notes such as now appear in *Butterworths' Current Law,* on Supreme Court decisions. The notes were somewhat formal in that they gave the names of the solicitors on the record and of counsel appearing as well as substantial quotations sometimes from the judgments themselves.

An anonymous "Inner Templar" wrote a London Letter, and there was one article. In the first issue the article was written by the Chief Justice, Sir Robert Stout. The subject he wrote on was Dominion Citizenship. As an historical relic of that time the article is being reprinted in this issue at [1985] NZLJ 77 together with a subsequent letter signed H F O'Leary, a correspondent who was himself to become, subsequently, Chief Justice.

The articles in the two following issues in March 1925 were on *Restitutio in Integrum in Innocent Misrepresentation Cases* by Claude H Weston, and *The Chattels Transfer Act 1924* by Alfred de Bathe Brandon. The anonymous author was living up to his promise in the opening statement of the first issue that all the leaders of the New Zealand Bar could be expected to be contributors.

The main historical interest of these first three issues of March 1925 is in what can most accurately be described as the professional gossip columns under the general rubric Bench and Bar. The Law Societies seemed to have had an unending number of dinners or Annual Meetings. There is a report in the first issue of the farewell sitting in Wellington the previous month to mark the retirement of Mr Justice Hosking. This was followed by substantial notes on the recent appointments of Mr Justice Ostler and Mr Justice Alpers. In the next issue it was noted that:

> Mr Justice Hosking to whom we bade farewell in our last issue has been prevailed upon to return to the Bench for a short period. The Government has arranged for his appointment to the Bench in order that he may deal with the many applications filed under the Mortgages Final Extention Act 1924. We understand that his Patent is for six months in which time he will be able to dispose of all the applications filed throughout the Dominion.

This simple paragraph has a number of interesting points about it. There is of course the formality of the style itself, but it is too easy to attribute merely to changes of style, some significant changes of attitude that have taken place since 1925.

There is first the extention of the Patent – which of course is not the procedure now used. It will be noted that it was not for general judicial activity but was restricted in time to deal with a particular issue. That in itself tends to differ from the present practice, where retired Judges come back as needed to assist in the general work of the Court.

Then there is the reference to "the Dominion" instead of "the country" or"New Zealand" as we would say today.

The use of the word Dominion had a certain aura, and older practitioners will recall, perhaps with nostalgia that Dominion Day used to be a professional and Bank holiday. This was abolished eventually, but our state of nationhood required some formal acknowledgment so it was replaced by Waitangi Day, or New Zealand Day as it was first called at Norman Kirk's insistence.

More interesting still however is the phrase reading "the Government has arranged for his appointment to the Bench . . .". This use of the formula "has arranged" is in form a recognition of the constitutional position that Judicial appointments were, as they still are, appointments by the Crown. It may be that they are made on the advice of the Minister of the day, but they are not simply appointments by the Government.

The reality of the constitutional convention of the nature of Ministerial advice has probably led some politicians to misunderstand the constitutional nature of a Judicial appointment. It is, in its essence something different from a simple political appointment, and the linguistic and stylistic change that has occurred has tended to confuse the issue in the public mind; and apparently also in the minds of some policitians. Despite popular, and often academic, misunderstanding ours is not a constitutional system in which the only legitimacy for the exercise of authority is the blessing of regular, or even irregular, elections. Nor of course is the American system where the Constitution, as interpreted by the Supreme Court, limits the the powers of the elected representatives in Congress and of the elected President.

There are in these issues of 60 years ago many interesting sidelights in the scraps about members of the profession. There are for instance the several references to individual practitioners going to England and Europe on a trip, or referring to them returning to resume practice. The reason for this being newsworthy is simply that if they went, they would probably be away for a minimum of nine months or so because at least eight to ten weeks would be spent on the voyages there and back. It is now possible to get from Auckland to London more quickly than it was in 1925 to get from Auckland to Christchurch. So it used to be a noteworthy event, although it no longer is, that someone had gone to England, and in due course that they had returned.

Finally it is worth recalling, since he is still in practice in Auckland as the 1985 *New Zealand Law Register* shows, the following note of a significant change of address:

> Mr F H Haigh, Solicitor, Wellington, on the staff of Mr P J O'Regan, is leaving Wellington on 21st March, to take an appointment on the staff of Messrs Russell, Campbell & McVeagh.

Sixty years is a substantial time in the life of a man, and also in the life of a journal. In both cases life necessarily means that there has been continuity and change. *The New Zealand Law Journal* has had to alter to meet the needs and the interest of the profession, and no doubt will have to continue doing so.

P J Downey

Recent admissions

Barristers and Solicitors

Adams, R B	Auckland	14 December 1984	Maddox, A L	Auckland	14 December 1984
Ammundsen, H V	Auckland	14 December 1984	Miller, A	Auckland	14 December 1984
Andrew, P J	Auckland	14 December 1984	Monester, S R	Auckland	19 December 1984
Armstrong, J F	Auckland	14 December 1984	Newman, R H	Auckland	14 December 1984
Battersby, P J	Auckland	14 December 1984	Nicola, L J	Auckland	14 December 1984
Brown, L C	Auckland	14 December 1984	Nicoll, D J W	Auckland	14 December 1984
Buddicom, R M	Christchurch	14 December 1984	Parcell, J M	Auckland	14 December 1984
Colbert, D J	Auckland	14 December 1984	Reid, C H	Auckland	14 December 1984
Dervan, H M	Auckland	14 December 1984	Ross, S J	Auckland	14 December 1984
Dinggat, M A	Christchurch	14 December 1984	Rutter, N J	Auckland	14 December 1984
Elliffe, C MacF	Auckland	14 December 1984	Seng, M T	Christchurch	14 December 1984
Glazebrook, S G M	Auckland	14 December 1984	Smith, B P	Auckland	14 December 1984
Gregory, D E	Auckland	14 December 1984	Speed, A G	Auckland	14 December 1984
Grinlinton, D P	Auckland	14 December 1984	Stockinger, V R	Auckland	17 December 1984
Gundesen, M R	Auckland	14 December 1984	Sue, C H	Auckland	14 December 1984
Hackshaw, M F	Auckland	14 December 1984	Swan, A McG	Auckland	14 December 1984
Heap, J A	Auckland	14 December 1984	Taylor, J S	Auckland	14 December 1984
Hunt, B J	Auckland	14 December 1984	Teo, Tee Hon	Christchurch	10 December 1984
Hutt, R A	Auckland	14 December 1984	Thomas, S D	Auckland	14 December 1984
Inder, C W	Auckland	14 December 1984	Thompson, S G	Auckland	14 December 1984
Ismail, M D B	Christchurch	14 December 1984	Truscott, E M	Auckland	14 December 1984
Janissen, S M	Auckland	14 December 1984	Udovenya, R G	Auckland	14 December 1984
Jansen, H A	Auckland	14 December 1984	Vaughan, S E	Auckland	14 December 1984
Jones, S E	Auckland	14 December 1984	Vujnovich, A I	Auckland	14 December 1984
Kiong, L S	Christchurch	14 December 1984	Webster, S J	Whangarei	14 December 1984
Klisser, E E	Auckland	14 December 1984	Williams, R A	Auckland	14 December 1984
Lawler, E T	Auckland	14 December 1984	Winkelmann, G C	Auckland	14 December 1984
Liew, C C	Auckland	14 December 1984	Wiseman, M J	Auckland	14 December 1984
Lourdes, J S	Auckland	14 December 1984	Woods, D	Auckland	14 December 1984
Lynch, C M	Auckland	14 December 1984	Wun, F T	Auckland	14 December 1984
McCabe, S E	Auckland	14 December 1984	Young, J J G	Auckland	14 December 1984

Dominion Citizenship

By the Hon Sir Robert Stout PC, KCMG, DCL Oxon, LL D Manchester and Edinburgh.

This article appeared in the first issue of Butterworths' Fortnightly Notes *(subsequently renamed the* New Zealand Law Journal*) which was published 60 years ago on 3 March 1925. At that date Sir Robert Stout was 70 years of age, and he had been Chief Justice of New Zealand for 26 years. The article is interesting in many ways. The opening sentence, relating New Zealand to such things as George Washington's birthday, the colonies and the Empire is redolent of a political world that now seems unbelievably distant. The simple use of the definite article for "the colonies" and "the Empire" suggests a world picture that we cannot now recognise. The article is also interesting for the perceptive foresight of the last paragraph. It was to be six years before Sir Robert Stout's prophecy came true with the passing of the Statute of Westminster in 1931, and 22 years before this statute was adopted, in 1947, as part of the law of New Zealand.*

The article is largely concerned with the case of R v Landers *[1919] 38 NZLR 305. Sir Robert Stout has some criticisms to make of the decision of the majority in that case. It is particularly noteworthy however that the majority had little difficulty in declaring a statutory provision of the New Zealand legislature to be ultra vires. With the current talk of a Bill of Rights which may be some sort of fundamental law restricting the powers of the legislature, the New Zealand Courts might well soon find themselves again being faced with arguments of a similar nature.*

The final point that is especially interesting is that in that same month H F O'Leary (later himself to be Chief Justice) wrote a letter, which is also published below, in which he differed to some degree from Sir Robert Stout. A reference back to the Law Reports discloses that four Judges found the relevant statutory provision to be ultra vires the New Zealand legislature and accordingly set the prisoner free. One Judge dissented. He was Chief Justice Sir Robert Stout. Counsel who appeared successfully for the prisoner was H F O'Leary.

New Zealand has been celebrating the birthday of George Washington, and this makes us recall the position in which the Colonies now stand in reference to the Empire. If the wide authority given now to the Dominions of Britain had been conferred on the North American Colonies there would have been no Revolution, and the United States might now have been part of the Empire of Britain.

Colonial nationalism

Times have changed, and the opinions of statesmen and citizens have changed with the times. There are, however, many questions yet to be settled as to what the future relationship is to be between the Dominions and the Empire. The question may be put even in this way: is there to be recognition in Britain of Dominion citizenship apart from what may be termed Imperial citizenship, or, to use the phrase that was used in a book by Richard Jebb "Is there to be a Colonial Nationalism?" This matter may well be considered.

We have now a statute dealing with British nationality and the status of aliens in New Zealand. Our statute on this subject was passed in 1923 and reserved for the signfication of His Majesty, and there the definition of a British subject is as follows: "A British subject means a person who is a natural born British subject or a person to whom a certificate of naturalisation has been granted in New Zealand." This definition, it will be seen, excludes perhaps many millions of British subjects. In fact, it excludes British subjects in British Dominions.

For example, to take an extreme case, there is British territory in Hongkong, China, and if the Honkong Legislature issued a certificate of naturalisation to a Chinaman, could it be said that that Chinaman was a British subject within the meaning of the definition in our British Nationality and Status of Aliens New Zealand Act 1923? It could not be said that this person naturalised in Hongkong was a natural born British subject. A law somewhat similar was in force in New Zealand in our 1908 Act, because it provided that a person who had got naturalisation and was not a natural born British subject had to get that naturalisation recognised in New Zealand before he would be treated in New Zealand as a British subject.

New Zealand citizenship?

Then the question will arise: what will be the rights of this British subject in New Zealand who has become in a sense a New Zealand citizen? Is there such a thing as New Zealand citizenship?

This question has been raised in more than one New Zealand case. It may be sufficient, however, to refer to the case of *Rex v Lander*. That case was heard by our Court of Appeal in 1919, and the question reserved was whether a person who was a New Zealand citizen, being born in New Zealand, domiciled in New Zealand, married in New Zealand, employed in the Expeditionary Force of New Zealand, went to England as a New Zealand soldier and there entered into a bigamous marriage could be prosecuted in New Zealand on his return for the crime of bigamy?

Our Court of Appeal by a majority held he could not on the ground that our Legislature had no power to pass s 224 of the Crimes Act. That section defined bigamy as a crime in the following words: "The act of a person who, being married, goes through the form of marriage with any other person in any part of the world." If there was power to pass that Act the person charged with the offence was guilty of bigamy, but the majority of the Court of Appeal held that the words "in any part of the world" were ultra vires of the New Zealand Constitution Act. That Act provided that the General Assembly of New Zealand, which is its Legislature, had power to pass laws for "the peace, order and good government of New Zealand". The contention

was that if the bigamy was committed outside of New Zealand and the New Zealand citizen returned to New Zealand it was not against the peace, order and good government of New Zealand to have New Zealand a kind of Alsatia, and that such a criminal had a right to remain in New Zealand without being prosecuted.

Colonial jurisdiction

This contention has been discussed and objected to in a very able paper published in the Canadian Law Journal by the Chief Professor of Law in Ontario. The decision of the Court of Appeal was based on the judgment of the Privy Council in *McLeod v Attorney-General of New South Wales.* and there are no doubt phrases in the judgment of their Lordships that show that the Courts must assume that laws passed in the Colonies can only deal with acts done within the jurisdiction. The phraseology of the Privy Council was as follows:

> Their Lordships think it right to add that they are of opinion that if the wider construction had been applied to the statute, and it was supposed that it was intended thereby to comprehend cases so wide as those insisted on at the Bar, it would have been beyond the jurisdiction of the colony to enact such a law. Their jurisdiction is confined within their own territories, and the maxim which has been more than once quoted, "Extra territorium jus dicenti impune non paretur," would be applicable to such a case. See 1891 AC 455, 458.

It has to be remembered, however, that this is really obiter dictum because in the interpretation of the New South Wales statute the Council came to the decision that it was not the intention of that statute to provide for the punishment of bigamy outside New South Wales. The New Zealand statute, however, has the words: "an act done in any part of the world," and therefore, in order to rely on the *McLeod* case, it had to be assumed that this obiter dictum was binding on the Court of Appeal of New Zealand.

Our statute, the British Nationality and Status of Aliens New Zealand Act 1924, shows that there is recognition of New Zealand citizenship as distinct from that of Britain, becuse a citizen of the British Empire or a subject of the British King will not be recognised as a British subject in New Zealand, if he does not come within the very words of s 2 of the British Nationality and Status of Aliens New Zealand Act 1923, which says "A British subject means a person who is a natural born British subject or a person to whom a certificate of naturalisation has been granted in New Zealand".

British Subjects

A person who came from South Africa who had been born in India, or born in China, and claimed to be a British citizen because he had been naturalised in the Dominion of South Africa, would not in New Zealand be recogised as a British subject nor as a British citizen. It will therefore be seen that we have created two kinds of what may be termed British subjects. We have a British subject who is a natural born British subject, one born in British Dominions, and we have also those British subjects who have been naturalised in British Dominions, perhaps, even in Britain itself, and New Zealand will not recognise the latter class as British subjects nor as citizens. Before they can become a citizen of New Zealand will all its advantages and duties, there must be a naturalisation in New Zealand if a person is not a natural born British subject. This is then a kind of New Zealand citizenship.

There is closely connected with this position a further question; if there is to be this British subject created into a New Zealand subject or a New Zealand citizen, what is to be the control in New Zealand over this New Zealand citizen? Is the Dominion to have the same control over this New Zealand citizen as British has over a British subject who had been naturalised? Further, is New Zealand to have the same control over its natural born citizens and naturalised citizens as Britain has over its natural born and naturalised citizens? The basis of the jurisdiction must rest on the definition that it is necessary that there should be authority so as to provide for peace, order, and good government in Britain.

Has then Britain power to punish for bigamy committed by one if its subjects outside of British territory? There have been many cases in Britain in which persons have been convicted for bigamy outside of England, such as Earl Russell's case (1901, AC, 446). In that case a British subject married after a divorce granted in the United States. It was held that the marriage contracted in the United States was invalid by English law, and that Earl Russell was guilty of bigamy in marrying in the United States after such a divorce.

That being so, why should not a citizen of New Zealand who acts as Earl Russell did not be liable to be punished in New Zealand? The law existed in England because it was said the morals of the community were affected. That means that peace, order, and good government of the people were infringed. Would not the peace, order, and good government of New Zealand be infringed by people committing bigamy abroad? Our Court of Appeal has felt itself bound by other obiter dictum in *McLeod's* case to hold to the contrary, but in view of the fact that there is now a distinct citizenship from the British citizenship created in New Zealand by the Act already referred to passed in 1923, it will surely be necessary to reconsider the case of *Rex v Lander.*

Legislative powers

In fact, the full power that Britain has in dealing with its subjects must be granted to the Governments of the Dominions in dealing with their subjects, and we may have a person recognised in England as a British subject who is not recognised in New Zealand as such. We therefore have what may be termed a New Zealand citizenship differing from British citizenship, and our laws must surely be made applicable to such a position.

It may be pointed out that in the case of "Russell and the King" on the information of Woodward (7 AC 829), it was held by the Privy Council that the words "peace order, and good government" dealt with a class of subjects different from mere property and civil rights, and that the morals of the people had to be considered. This being so, the time is surely ripe for reconsidering the decision of *Rex v Lander.*

It is true that the Court of Appeal's decision stands, and it

cannot be varied apparently even by our Legislature, because the Court of Appeal held that it was ultra vires of the New Zealand Parliament to deal with the conduct of New Zealand citizens ouside New Zealand territory, and that therefore the legislative powers of New Zealand were not so extensive for the governance of New Zealand, as the legislative powers of the Imperial Parliament are for the governance of England.

Status of Dominions

This then is a question which requires perhaps legislative interference by the Imperial Parliament, and the time is surely not far distant when the full status of New Zealand and other Dominions for the governing of their citizens will be granted to the Dominions of the Empire. It all turns upon what is to be the control of Dominion citizens by Dominions. Does a New Zealand soldier who goes to fight for the Empire cease to be under control of New Zealand when he goes abroad, and has he a right to come back to his domicile and his country free from any responsibility for his acts when abroad? That is not allowed in England, and surely the time has come when citizenship of New Zealand will be recognised as meaning the same as citizenship in the Mother Country. □

Subsequent correspondence

The above article appeared in the first issue of Butterworths Fortnightly Notes *on 3 March 1925, and the following letter commenting on the article appeared in the third issue on 31 March 1925.*

Sir, — I have received the first issue of "Fortnightly Notes," and may I congratulate you on the publication of same. One does not need to enumerate the benefits which should be derived from them, nor the interest in our profession which they should stimulate amongst practitioners.

I take it that, acting in the same way as such well-known English periodicals as "The Solicitors' Journal" and "The Law Journal," you will open your columns to correspondents who desire to comment on any matter published in the Notes or of general legal interest.

Assuming this, I wish to make a few observations on the article "Dominion Citizenship" contributed to your first issue by Sir Robert Stout, In *Rex v Lander* referred to in the article Mr Justice Chapman doubts whether there can be such a thing as "Citizenship" in international law, but, assuming there can, it seems that at the present time we have no New Zealand "Citizenship" as distinct from British "Citizenship." I think all would agree with Sir Robert as to the desirableness of distinct citizenship being created for the Dominions if such will give a more effective control over wrongdoers in our midst, but I further think that the only means of bringing this about is by legislation of the Imperial Parliament and not by any re-consideration of the case of *Rex v Lander*. In *Lander's* case the submission that there was at that time (1919) a distinct New Zealand citizenship was rejected by the Judges who formed a majority of the Court and who quashed the conviction. The dissenting judgment upholding the conviction favoured the view of a separate citizenship. I cannot see that the British Nationality and Status of Aliens Act 1923 alters the position as we had virtually the same provision in The Aliens Act 1908 and *Lander's* case was decided in 1919. In any event our legislature has not at present the power to pass an enactment which would affect acts done not within our territory, and therefore an attempt to control the acts of New Zealand "citizens" outside of New Zealand by creating a distinct New Zealand "citizenship" would be ultra vires. Mr Justice Hosking said in *Lander's* case:

> If a dependency desires to be armed with further powers (than those contained in the Constitution Act) in any respect it must approach the Imperial Legislature.

The parentheses are mine and are required to make the quotation clear.

The simple reason why our New Zealand Courts could not deal with Lander in the same way as the English Courts dealt with Earl Russell is that Britain is a sovereign State whilst New Zealand is a subordinate State. The legislative power of the one is unresisted whilst the other is restricted by its Constitution Act.

In his review of *Rex v Lander* the learned contributor contends that the decision was based on an obiter dictum in the judgment of *McLeod v Attorney-General of New South Wales*. I respectfully suggest that this was not the opinion of the majority of the Court. Mr Justice Edwards in his judgment makes it abundantly clear that he does not consider the passage relied on from *McLeod's* case as in any way obiter, and the reason of His Honour in coming to that conclusion seems to be irresistible. Mr Justice Chapman while not definitely saying whether the passage is obiter or not says quite clearly that "it was not a hasty incidential opinion such as all Courts feel themselves entitled on reconsideration to ignore". Mr Justice Sim says "The judgment of the Privy Coucil in *McLeod's* case appears to be a clear authority for saying it (ie the New Zealand Legislature) had no jurisdiction to do so (ie enact the particular section under review)." Mr Justice Hosking expressed similar views, and it seems therefore that the position of *McLeod's* case relied on cannot be treated as obiter dictum, but as a definite decision. In any event the decision in *Rex v Lander* stands and it certainly cannot be re-considered by our Courts, nor indeed by our Legislature. It can alone be altered by the Imperial Legislature giving the requisite power to the New Zealand Parliament, and with respect I say it does not seem possible to help the position by our Legislature attempting to create a New Zealand citizenship.

Probably the time is approaching when the Dominion should be given control over those domiciled within its shores in respect of criminal acts wherever committed, but the obtaining of this power is of course a matter for the politician and the statesman and is somewhat outside our scope as lawyers. — I am, etc,

H F O'Leary

Cross-directorships and merger or takeover proposals under the Commerce Act 1975

By C E Cliffe, Lecturer in Accountancy, University of Canterbury

Two recent decisions of the Commerce Commission have considered whether consents to merger or takeover proposals under the Commerce Act should be made conditional upon resignation of common directorships where these are held between competing companies. This article briefly discusses policy concerns arising from cross-directorships and comments on the Commerce Commission's decisions in Tucker/Edmonds *and* Transfin/Growers.[1] *In doing so it questions aspects of these determinations and identifies an area in which legislative change appears to be necessary.*

Cross-directorships — policy concerns

A cross or interlocking directorship exists where an individual is simultaneously a director on the board of two or more companies. Objections to these interlocking relationships have been raised on four broad grounds.[2] First, cross-directorships may involve directors in conflicts of interests where the interlocked companies deal or compete with each other. Second, an accumulation of cross-directorships in the hands of a few individuals may lead to a centralisation of decision-making and thereby to an undue concentration of economic power. A third criticism is that an accumulation of cross-directorships may lessen opportunities for advancement by young managers and adversely affect management quality by fragmenting a director's time and attention so that he is unable to serve effectively on any board. Finally some cross-directorships may have anticompetitive consequences.

For present purposes these may be classified into two broad types. First, cross-directorships may effect common control. If the majority of two boards of directors is composed of the same members, or if there is a complete identify between boards, a major competitive threat may ensue from bringing two otherwise independent boards under common control. Second, competitive harm may result merely from the sharing of one director. The presence of a common director facilitates communication and may permit the co-ordination of policies between nominally independent companies. Cross-directorships thus may be used as a channel of information to facilitate collective agreements.

Additionally there is a concern that access to information, participation in planning and policy decisions and the tendency to negotiate complex issues may lessen market rivalry by reducing the uncertainty of competitors' responses and by reinforcing a community of interest. Potential for independent action is thereby reduced and conscious parallel behaviour facilitated. Objections have also been raised to vertical or supplier/customer interlocks on the grounds that they may lead to preferential treatment or injure competition by foreclosing competitors from an outlet or source of supply.

The potential for cross-directorships to have anticompetitive and other effects contrary to the public interest makes them the concern of competition policy. But there remains the question of how best to approach these concerns through competition law. The following section therefore outlines and comments on the policy approach and principles established by the Commerce Commission in this area to date.

Cross-directorships under the Commerce Act 1975

(i) *Principles and policy approach*[3]

In *Tucker/Edmonds* the Commission first had occasion to consider whether cross-shareholdings and interlocking directorships were an impediment upon competition between two major competitors. In approaching this question the Commission considered its function was to assess market structures at the time of the transaction rather than to predict how the directors or companies might behave in the future. Accordingly on the present facts of the case the Commission found no evidence to indicate that the close relationship between the two companies concerned, the Wattie and Goodman Groups, inhibited competitive conduct in the baking powder and self-raising flour market and therefore declined to require the shared directors to resign.

The Commission considered that the public was already adequately protected by the restrictive trade practices section of the Act which provides significant sanctions against companies who, through cross-shareholdings or interlocking directorships, enter into an agreement or arrangement to restrict competition. There was therefore in its view no need to impose additional conditions upon merger approvals.

In a later press release (10 August 1984) the Commission stated that as a general principle it believed it should not interfere with the selection of directors, this being a matter which is generally the prerogative of shareholders. The risks inherent in cross-directorships between competitors were considered to be primarily for the assessment of the directors themselves as a matter of professional conduct.

This position was reaffirmed and elaborated in *Transfin/Growers.* Here

the Commission stated that cross-directorships have the potential to be contrary to the public interest, particularly if they result in a reduction of competition between competitors, but such a restriction could not, under the case-by-case approach adopted in the Commerce Act, be assumed merely from the existence of the cross-directorship. The Commission therefore found itself unable to assume in advance and without evidence that such an offence would be committed.

The Commission went on to point out that even in the United States – the home of the per se approach to competition policy – s 8 of the Clayton Act (as interpreted by the Commission) made interlocking directorships in two competing companies unlawful only if they resulted in an agreement between companies which is likely substantially to lessen competition. The Commission accordingly formed the view that before a condition prohibiting a cross-directorship could be imposed under the New Zealand law it had to be demonstrated on the facts of each case that the cross-directorship may result in a restriction of competition or some other harm to the public under s 80 of the Act. Where this was a real likelihood the Commission could, in its view, disallow the cross-directorship even if no offence had been committed.

(ii) *Comment*

In the foregoing decisions the Commission gave broad notice of the circumstances in which cross-directorships are relevant to competition policy as expressed in the Commerce Act, discussed the policy approach most consistent with its scheme of control and in doing so compared it with the analysis required under s 8 of the United States Clayton Act. In light of the Commission's comments the provisions of this section warrant closer examination. The relevant part of s 8 states:

> no person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce . . . if such corporations are or shall have been theretofore, by virtue of their business and location of operation competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws. . . .

Whilst the wording of the section gives rise to problems of interpretation the consensus of current authoritative commentary and the Courts have construed it as a per se prohibition against direct horizontal interlocking directorships.[4] For example, Areeda and Turner, referring to interlocking directorates, state:

> . . . the most dangerous links – those between competitors – are covered by Clayton Act s 8 which . . . requires no proof of effects. In addition, it may be that harmful efects have not actually occurred or been threatened with sufficient clarity to prove.

and later in discussing the Courts' construction in the *Sears, Roebuck* and *Protectoseal* cases:

> The Court adopted a per se rule requiring only a showing that two firms are or have been competitors and that the dollar amount is sufficient to invoke the Act.[5]

Essentially s 8 prohibits a person serving as a director on the board of any two or more competing industrial corporations if either company has capital, surplus and undivided profits aggregating more than $1 million, without inquiry as to whether there is an adverse effect on competition. Contrary to the Commerce Commission's interpretation noted above neither an agreement nor a substantial lessening of competition are required before the section can be invoked.

In this respect the Australian text "Trade Practices Law Vol 1" authored by Donald and Heydon appears to have similarly erred in its brief note on s 8.[6] The authors fail to recognise that s 8 does not follow the pattern established in other sections of the Clayton Act dealing with price discrimination (s 2), exclusive dealing and tying (s 3) and mergers (s 7) all of which are unlawful only if their effect may be substantially to lessen competition or tend to create a monopoly. This test does not apply to s 8, contrary to the authors' statement.

The origin of s 8's per se construction stems from the problematical "so that" clause. The Courts[7] have interpreted this clause to mean that if any agreement between two competing companies to eliminate competition would constitute a violation of any of the provisions of any of the antitrust laws then a common directorship between the two companies is unlawful. Since a price fixing agreement (which is illegal per se) could always be hypothesised between the two interlocked companies it follows that this renders the "so that" clause a per se prohibition. Hence cross-directorships are under s 8 illegal per se if the four statutory requirements of the section are met. Namely, (i) the minimum dollar size requirement, (ii) both companies must engage in interstate or foreign commerce and (iii) must be corporations other than banks, banking associations, trust companies and common carriers and (iv) must be actual competitors in the same geographic and product market. These jurisdictional requirements substantially reduce the sections reach.

Despite its per se nature s 8 has a number of loopholes for which it has been criticised.[8] It does not cover interlocks where a manager, employee or substantial shareholder of one company serves as a director of a competing company. It does not reach vertical interlocks such as between supplier and customer nor does it cover cross-directorships between potential competitors.

The section has, moveover, not been interpreted to reach indirect horizontal cross-directorships that link competing companies through a third company such as a supplier, customer or parent. In this latter instance, however, the Court in *Kennecott Copper Corp v Curtiss-Wright Corp*, 584 F 2d 1195 (2d Cir 1978) left open the possibility that s 8 could apply where the parent closely controls and dictates the policies of its subsidiary. This issue was also raised in *Transfin/Growers* and commented upon by the Commission in similar manner. These limitations of s 8 are mitigated to the extent that cross-directorships may also be challenged under the Sherman Act if their effect is to restrain trade or tend to establish a monopoly or, alternatively and more frequently, under the Federal Trade Commission Act's prohibition against unfair

methods of competition (s 5) if shown to be injurious to competition.

The Clayton Act aside, there are difficulties in formulating effective competition legislation dealing specifically with cross-directorships. In part this arises from the fact that cross-directorships in themselves are, from a competition policy point of view, neither inherently good nor bad. They need not necessarily result in a misuse of competitive information or otherwise harm competitors or the wider public interest. They only may have such effects.

Much depends on the circumstances in which they are employed and on the attributes of the incumbent. They therefore do not meet the general standard required for per se prohibition. Namely, as was said in *Northern Pacific Railway Co v US* 356 US 1, 5 (1958):

> . . . there are certain business practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively deemed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.

Per se offences thus rest on the presumption that the relationship concerned is generally harmful and that beneficial consequences are so rarely present that they may be disregarded. Cross-directorships do not fall into this category. On the contrary a director with managerial skills and expertise in a particular industry may do much to solve company problems and encourage progressiveness. The risk of abuse may be outweighed by the benefits. Accordingly a prohibition that condemns cross-directorships without a factual examination of their competitive effect is unwarranted.

Nevertheless the existence of anticompetitive potential mandates some form of regulation. The realities of the competitive problem and the business environment suggest that the legislation covering restrictive trade practices, monopolies and mergers should, under a rule of reason analysis, be sufficiently effective and comprehensive to encompass all those interlocking relationships that serve, actually or potentially, to harm competition or the wider public interest. It will be argued below that the present Commerce Act does not accommodate this objective.

Cross-directorship effecting common control

Under the Commerce Act 1975 cross-directorships are subject to scrutiny only if they fall into one of the categories of restrictive trade practices listed in the Act or are otherwise associated with a monopoly, oligopoly or merger or takeover proposal qualifying for investigation. The facts in *Tucker/Edmonds* suggest that cross-directorships whereby the directors of one company comprise a majority on the board of another company do not constitute a merger or takeover proposal under the Commerce Act.

Yet the effect of such arrangements is to bring two previously independent companies under common control. Its control consequences are analogous to those of an acquisition of a majority holding of shares or assets. Since a firm may acquire or increase its market power by this method it follows that cross-directorships effecting common control should be encompassed by the statutory definition of a merger or takeover proposal. The following facts indicate that the legislation may be deficient in this respect.

In October 1982 W F Tucker Ltd (a wholly owned subsidiary of Watties Industries Ltd through Cropper-NRM Ltd) acquired the first 50% of the shares and voting power of Edmonds Food Industries Ltd, a virtual monopoly producer of baking powder. Edmonds Food Industries Ltd (Edmonds) was incorporated as a private company to purchase specific assets of T J Edmonds Ltd whose economic viability was in doubt. As a part of this restructuring the agreement provided, inter alia, for Tucker to manage Edmonds, appoint the general manager and a majority of the directors and to be given an option to acquire the remaining 50% interest in the company. Subsequently four executives of Watties Industries Ltd were appointed to the seven-member Edmonds Board with the general manager of Tucker also being appointed general manager of Edmonds.

The effect of these arrangements was to make Edmonds a subsidiary of Watties Industries Ltd by virtue of Watties ownership of Tucker and the latter's control over the composition of Edmonds board of directors.[9] Despite the transfer of effective control to Watties the arrangement did not constitute a merger or takeover proposal under the Commerce Act[10] due to the absence of any provision in that Act relating to control of the board of directors.[11] If the transfer of effective control had alternatively taken the form of a share acquisition or one of the other forms prescribed in the Act the merger would have been subject to its pre-notification and prior approval requirements. It is anomalous that merger regulation should, in cases, depend on the form in which a merger proposal is couched rather than on the reality of previously independent entities being brought under common control.

Although it may be argued that the avoidance provision enacted by the 1983 amending Act is a saving feature its wording would, however, seem to give it restricted application. The provision, s 67(7), states that:

> For the purpose of determining whether any proposal is or is not a merger or takeover proposal, regard shall be had to the substance rather than the form of the proposal; and any proposal that it draws in such a way as to appear to be designed to defeat, evade, or prevent the operation of this Part of the Act shall be deemed to be a merger or takeover proposal if that is in substance what it is.

By its wording the latter part of the subsection would seem to require evidence of purpose or intent to defeat, evade or prevent the operation of the merger provisions. This may be difficult to establish particularly when some sound commercial justification is claimed for structuring the proposal in its particular form.

The circumstances in *Tucker/Edmonds* suggest such reasons existed. It is therefore unlikely that the initial *Tucker/Edmonds* proposal would have been caught by s 67(7). Hence it would seem that one company may become a subsidiary of another in terms of the Companies Act 1955 and yet not constitute a merger or takeover proposal under the Commerce Act even though effective control of that company had been acquired by another.

The interpretation of s 67(7) itself presents some difficulties. It is not clear whether a design to circumvent

the Act need be the sole, a predominant or only a substantial motive or reason for drawing the proposal in the manner concerned. Further, as illustrated by *Tucker/Edmonds,* although an arrangement may in substance be a merger or takeover proposal — ie have the same consequences as to control — this in itself is insufficient to bring it within s 67(7). An additional element viz that of design to avoid the operation of the merger provisions, must also be apparent to the Commission. It remains to be seen whether unusual arrangements might in themselves constitute evidence from which design may be inferred.

It is furthermore arguable whether the requirement of design is relevant to an avoidance provision concerned with the definition of a merger or takeover proposal, particularly as the merger provisions are of a non-penal nature. The definition section serves merely to establish jurisdiction — that is, to bring under scrutiny merger or takeover proposals which have the potential to operate against the public interest.

The public interest test is the basis for illegality and this is solely an effects based test. Illegality depends not on intent to cause competitive or social harm but on whether such effects resulted or are likely to result. Logically therefore design is irrelevant to the decision regarding whether a merger proposal should be subject to investigation under the Act.

In summary, the foregoing has argued that the statutory definitions of a merger and takeover proposal do not catch proposals effected by means of acquiring control of the board of directors where there is no clear evidence of design to circumvent the merger provisions. It has further questioned the need to show design in provisions which merely serve to establish jurisdiction in a scheme of merger control which is essentially effects based. In part these anomalies arise from the structure of the present merger provisions with its emphasis on express categorisation of particular methods of acquisition. This makes it difficult to encompass all possible types of relationships by which firms can be brought under common ownership or control. Cross-directorships effecting common control evidence one instance of this difficulty.[12]

Evaluation of competitive effect

A final point warranting brief comment is the Commission's evaluation of competition between the interlocked companies in *Transfin/Growers*. Conventionally in competition law a relevant market is defined in order to determine whether effective competition exists between two or more firms. On the facts of the case the Examiner of Commercial Practices in para 9 defined the relevant product and functional markets as:

> the markets for the purchase of fruit and vegetables for processing, and the processing and distribution of such products.

Its geographic dimension was left unspecified. Having delineated the market on the basis of the present facts the next step fell to determine whether effective competition would exist in that market after the merger. This resolved to a determination of the competitive effect of the cross-directorship linking Growers and Watties.

One factor entering into this determination was the relative volume and pattern of Growers and Watties sales. The representative of Growers pointed out that unlike Watties, Growers is a relatively small company primarily engaged in processing the more exotic types of canned fruit (kiwifruit, boysenberries, strawberries, asparagus) predominantly for export with only 15% of its production being supplied to the local market. In contrast 93% of Watties canned food sales were made in the domestic market. Growers total domestic sales therefore amounted to only 1.5% of those achieved by Watties. In view of these facts the company contended as stated in para 12 that:

> it was almost impossible to conceive that the wide disparity in domestic sales could give rise to a situation that was contrary to the public interest by inhibiting competition between the two companies.

In its evaluation of these facts the Commission found at para 17 that competition between the two companies is, in fact, relatively insignificant. This finding was one of the five reasons which led the Commission to conclude that the cross-directorship in question was unlikely to present a competitive problem.

In finding that competition was relatively insignificant the Commission confined itself solely to the present facts without further examining the potential constraint Growers provided on Watties dominance in the domestic market. In particular, if domestic prices were to rise sufficiently the capacity used for export production could be diverted to the domestic market thereby serving to limit pricing flexibility over the goods in question.

Additionally, in the longer term it would seem that Growers had sufficient production flexibility, given the similarity of production techniques, to produce non-exotic lines directly competitive in the same domestic product segment as Watties. That Growers apparently did produce some non-exotic lines for the domestic market suggests that effective supply substitutability existed in the longer term.

Moreover, Growers in evidence stated that as a consequence of the merger it intended to undertake a major expansion of its canning facilities. This further suggests that the future competitive significance of Growers was greater than the present facts indicated. The apparent omission of these considerations from the evaluation of competition may have understated the competitive significance and potential of Growers in the relevant market.

In general whilst the definition of the relevant market should be based on present facts, an evaluation of competitive effect in that market would seem to necessitate a consideration not only of present competitive facts but also of potential future competition.[13] Such an approach would more adequately analyse the competitive constraints operating on market participants and their ability to act relatively independently of them. □

---

1 *Re Proposal by Transfin Investments Ltd,* Decision 84, 21 June 1984. *Re Proposal by W F Tucker & Company Ltd,* Decision 96, 11 October 1984.

2 See, eg Halverson, *Interlocking Directorates — Present Antitrust Enforcement Interest Placed in Proper Analytical Perspective* [1976] 14 Villanova LR 394-395; Report on Interlocks in Corporate Management, Staff

of Antitrust Subcomm of the House Judiciary Committee, 89th Cong 1st Sess (1965).

3 Supra note 1 and the corresponding Press Releases issued 10 August and 12 October 1984; J C Collinge *Merger and Takeover Policy and Procedures in New Zealand.* Paper presented at a seminar on the "Control of Mergers and Takovers Under the Commerce Act 1975: an analysis of recent legislative and policy developments including a discussion of the Australian law and practice". University of Canterbury, September 1984.

4 Eg Oppenheim, Weston and McCarthy, *Federal Antitrust Laws* 4 ed 1981, 536-5439; von Kalinowski 4 *Antitrust Laws and Trade Regulation* 1983, para 21-02(2). Kintner, *An Antitrust Primer* 2 ed 1973, Ch 13.

5 Areeda & Turner, 4 *Antitrust Law* 1978, 361, 364; *US v Sears Roebuck & Co,* 111 F Supp 614 (SDNY 1953); *Protectoseal Co v Baranak* 484 F 2d 585 (7th Cir 1973).

6 1978 p 5: This error appears to have resulted from the authors' stated reliance on the British text *The Antitrust Laws of the USA* by Neale which on p 3 (1970 ed) contains the same error in similar wording. The 1980 edition (p 210) by Neale & Goyder refers to the Court's Protectoseal per se ruling (supra note 5) but retains the same error on p 3.

7 Supra note 5.

8 Eg Jorgensen & Clark, *Interlocking Directorates and Section 8 of the Clayton Act,* [1979] 44 Albany LR 139; Travers, *Interlocks in Corporate Management and the Antitrust Laws,* [1968] 46 Texas LR 819.

9 Companies Act 1955, s 158.

10 Under the Commerce Act at that time the acquisition of shares in a private company which carried no more than 50% of the voting power at any general meeting was not deemed to be a merger or takeover proposal. The Commerce Amendment Act 1983 lowered the percentage threshold to 20%. This amendment does not, however, affect the above argument relating to cross-directorships effecting common control.

11 In the United Kingdom attempts by Lonrho PLC to secure the election of six of its own directors plus six outside nominees to the 25 member board of the House of Fraser PLC has recently been referred to the Monopolies and Mergers Commission by the Secretary of State. The Commission is to investigate whether these arrangements are in fact a proposd merger under the UK test of "ceasing to be distinct enterprises".

12 The German Act Against Restraints of Competition recognises these circumstances as a merger by deeming a merger to exist if at least half the members of one enterprise's board also constitute at least half of the board of another enterprise. Additionally a catch-all provision covers all types of relationships (not otherwise specifically categorised) by which one or several enterprises may, directly or indirectly, exercise a controlling influence on another enterprise s 23(2), (4) and (5).

13 Walker, *Geographic Market Definition in Competition Law* [1983] 13 Fed LR 305, 321.

Dissolution today

By Richard Webb, Professor of Law, University of Auckland

Now that there have been a number of reported cases both on the substantive and procedural legal aspects of dissolution, it may be thought worthwhile to take stock of what may be learned from them.

Jurisdiction

Whether or not the Family Court has jurisdiction in the conflict of laws sense to order dissolution of a marriage is a true preliminary issue. In *Scanlon v Scanlon,*[1] (1982) FLN 21(2d), the parties had been married in Northern Ireland in 1953 and, in 1981, the applicant husband came to New Zealand, the respondent wife remaining behind in Northern Ireland. The respondent wife did not defend her husband's application. Section 37(2) of the Family Proceedings Act 1980 provides that a dissolution application can be made only where, at the time it is filed, at least one party to the marriage is domiciled in New Zealand. Judge Mahony held that the husband had acquired a new domicile in New Zealand pursuant to s 9 of the Domicile Act 1976. The case for dissolution having been made out, the learned Judge dissolved the marriage.

The ground for dissolution

It is as well to recall that s 39(1) of the Family Proceedings Act 1980 enacts that an application for dissolution may be made only on the ground that the marriage has broken down irreconcilably, a fact of which one is immediately reminded by the opening words of the form of application for an order dissolving a marriage. From an early stage, there seems to have been misunderstanding about this, for a number of people appear to have thought that, once irreconcilable breakdown was proved, dissolution could be ordered without further ado.[2] This, of course, was (and is) patently not the case because s 39(2) states that, in proceedings for an order dissolving a marriage, the Famiy Court[3] shall hold that the ground for the order has been established only where it is satisfied that the parties to the marriage are living apart, and have been living apart for the period of two years immediately preceding the filing of the application for an order dissolving the marriage.

Section 39(3) facilitates the proof of the living apart by providing that a separation order or separation agreement (whether made by deed or other writing or orally) in full force for the period of two years immediately preceding the filing of an application for an order dissolving a marriage may be adduced as evidence of living apart for the required period. The details of the "living apart" come before the Court in the body of the application, and, where s 39(3) is being relied on, through the requirement of Rule 15(4) of the Family Proceedings Rules 1981 that a copy of the separation order or separation agreement must be lodged at the time the application is filed.

No doubt in the vast preponderance of undefended and joint applications it would be unusual for the Court to conduct more than a brief inquiry to satisfy itself as to the facts pleaded. Thus in practice, the Court will be likely to accept the statements in the form of application. In this connection, it must be remembered that s 39(4) of the 1980 Act states that, in dissolution proceedings, where the ground for making the order has been established, "the Court shall, subject to section 45 of this Act, make an order dissolving the marriage". Section 45 requires the Court to "satisfy" itself about the arrangements for the welfare of the relevant children, if any, before dissolving the marriage. The arrangements are revealed to the Court via the form of application for the order dissolving the marriage.

It is the defended cases that have proved valuable in detecting trends. Judge Bisphan very neatly put matters in perspective in the defended case of *F v F* (1982) 1 NZFLR 449. The main question before him was whether or not the parties had "lived

apart" for the required statutory period. The husband alleged that they had; the wife argued that there had been a resumption of cohabitation. It was held that there had been no resumption.

It was briefly noted at the end of the judgment, p 458, that there was no prospect of reconciliation and that the marriage had irreconcilably broken down. The learned Judge said in the course of his judgment at p 450 that: the ground for dissolution was that of irreconcilable breakdown and that before a Court could proceed to consider whether a marriage had broken down irreconcilably, a condition precedent must exist, viz, that the parties are living apart and have been living apart for a period of two years immediately preceding the filing of the application. Accordingly, s 39(2) is not to be interpreted as if the living apart or two years in itself establishes irreconcilable breakdown. If that were so, said his Honour, it would make s 39(1) superfluous. Thus the Court must first be satisfied as to the preprequisite living apart and then turn to a consideration of irreconcilable breakdown.[4] Provided the parties have been living apart for the two-year period, it is not necessary for the marriage to be irreconcilably broken down throughout the whole of that period. The Court has to be satisfied at the hearing that the marriage has so broken down. To hold otherwise would make nonsense of the reconciliation provisions of s 40.[5]

In some cases there is no particular problem about the statutory period of "living apart", but there is a problem about the irreconcilability or otherwise of the breakdown. It can occur that one spouse says that he or she has a continued commitment to the other spouse and does not consider the marriage to be broken down, or irreconcilably broken down, while the other spouse displays a conflicting attitude – saying that she or he considers the marriage to be at an end and is set against reconciliation. The easy way out here would be to agree with Sir Jocelyn Simon P (as he then was) that breakdown is not really a matter that a Court can try so that, if one party adamantly refuses to consider living with the other again, the Court is in no position to gainsay him or her.[6]

One typical case of this kind is *Barker v Barker* [1983] NZ Recent Law; (1983) FLN 86 (2d). The spouses had lived apart for 13 years. The wife was sincerely willing to have her husband back, she believed in the sanctity of marriage and, basically, did not accept that the marriage had broken down irreconcilably. Accordingly, she opposed her husband's application. He, on his part, had no wish whatever to return to her nor to resume cohabitation. Indeed, he wanted to marry.

Judge Trapski acknowledged that the living apart "prerequisite" had been sufficiently proved, and observed that "the primary object of the inquiry" was to establish whether or not the marriage had broken down irreconcilably. This, he said, was not simply a matter of assertion by one of the parties, but a decision which must be made judicially on the basis of the evidence of all the circumstances surrounding the breakdown of the marriage (if there has been one) and what has happened since then, together with the attitude of the parties as expressed to the Court.

There is, he added, the necessity for the Court to look at the question of creditability in this matter just as in any other, so that simple statements made by one party are not necessarily conclusive or binding upon the Court in this or in any other matter. It is a question for the Court to make a finding on the basis of the facts as they are presented to it, interpreting the law and applying the law to those facts.[7] See also *Phillips v Phillips* [1982] FLN [112], where dissolution was ordered in very similar circumstances by Judge Mahony; and compare *Munro v Munro* [1981] FLN [28], where Judge Trapski adjourned the application.

In *Beard v Beard* (1983) FLN 120 (2d), Judge Inglis, QC, stated obiter that, in a defended dissolution case, s 39 of the 1980 Act required a rather more refined and sophisticated analysis of the state of the parties' marriage, their attitudes, the position of the children, than concentration only on whether the applicant wants to end the marriage. It must, however, be noted that if a marriage has broken down irreconcilably but the "living apart" prerequisite has not been met, the Court however convinced it is that the marriage is over cannot dissolve it: cf *Richards v Richards* [1972] 3 All ER 695.

It is interesting to see the approach taken in *Marinkovich v Marinkovich* (1983) FLN 88 (2d) the parties separated in 1980, the wife moving out because the husband's work and sports involvement kept him away from her and the two children for undue lengths of time. Proceedings were issued in 1980, at which time the husband's business failed and he suffered a serious accident.

Recognising his shortcoming, he sought personal counselling. He visited his family every week. The wife remained adamant that she would not resume the marriage and closed her mind to any counselling. Eventually, she began dissolution proceedings, which her husband opposed on the ground that the marriage had not broken down irreconcilably. The case was one *primae impressionis* for Judge Mahony. He appears to have put the English decisions on breakdown[8] more or less to one side as being concerned with the English "unreasonable behaviour" ground for divorce, as set out in s 1(2(b) Matrimonial Causes Act 1973 (UK), and embarked on a lengthy consideration of the meaning of "living apart".[9]

He concluded that he was satisfied that the grounds under s 39 had been established. The physical separation of the parties had taken place because the wife recognised that, for her, the marriage had come to an end; she had steadfastly remained of that mind throughout the statutory period; the authorities showed that that was sufficient to show that the marital relationship had been severed and therefore that the parties had been "living apart" within the meaning of s 39. "Accordingly it has been proved that the marriage has broken down irreconcilably."

It is respectfully submitted that His Honour appears to suggest that, once the two years' "living apart" *stricto sensu* has been established, it automatically proves the irreconcilable breakdown. If this was indeed the case, then it is preferable, in the writer's respectful submission, to follow the line of reasoning of Judge Trapski in the *Barker* case.[10]

The Family Court approaches dissolution applications with care

Many indications are to be found in decisions which reveal that applications for disolution are not being treated lightly in other respects either. One reason for care in their handling and consideration that has been advanced by Judge Inglis QC, is that there is no discretion to refuse

a dissolution order if the ground therefor is proved – though, of course, the Court cannot make an order unless the ground is proved.[11] Moreover also, he has pointed out that, even where proceedings are undefended, an order for dissolution operates as soon as it is made and the parties are at once free to remarry, ss 42 and 43, and there is no *locus poenitentiae*, no opportunity for anyone to intervene on the basis that the order has been wrongly made and there is no appeal, s 174(3).

Furthermore, the same learned Judge observed that the making of an order brings about an instant change of status from which there is no turning back – even if new evidence is later discovered which throws doubt on whether the order was rightly made or if it appears that the order should never have been made at all.[12] Thus, if there is uncertainty whether sufficient facts have been proved or have been sufficiently proved, the Court should consider adjournment or further investigation.[13]

Judge Inglis QC, also pointed out that, in an undefended case, the applicant's own testimony is that of an interested party so that assessment of his or her own credibility will almost invariably be a crucial factor. He or she will more often than not be the only person in a position to provide testimony at first hand about the start of the marriage and the vital issue whether the parties have "lived apart" for the required period. Accordingly, in *Williams v Williams* (unreported, Family Court, Napier FP 041/160/83; 19 July 1983). His Honour ruled that, as a matter of principle, an applicant's own evidence on an undefended dissolution application, which affected the parties' status, ought, unless the circumstances were exceptional, to be given *viva voce* by the applicant in person.

As His Honour pointed out, the Judge must be in a position to assess the applicant's credibility by seeing and hearing him or her in person.

For a case in which Judge Inglis QC, permitted the applicant to tender affidavit evidence in circumstances which were exceptional, see *Cole v Cole* [1984] NZ Recent Law 15. He ruled that, where there is some problem in procuring an applicant's personal appearance, the directions of the Family Court should be sought in advance of the hearing of the disolution application.

It was noted by His Honour in the *Little* case that, if there has been a separation order or separation agreement, it may normally be inferred, in the absence of any indication to the contrary, that it has been complied with. He added also that, in some cases, corroboration as to "living apart" will be necessary.

It is evident that, in the recent past, there have been cases which show that spouses have run into difficulties because insufficient attention was paid to the matter of correctly stating the date of separation in their agreement to separate. See, for instance, *Oliver v Oliver* [1980] NZ Recent Law 78, where Holland J dismissed a petition under the former legislation because he felt unable to hold that the parties' separation agreement had been in full force and effect for the necessary two-year period. For two cases under the present legislation, see *Whiting v Whiting* and *Rusling v Rusling* [1983] NZ Recent Law 50, and the criticism thereof by the commentator. One would have thought that, if a Court were uneasy about a separation stated to have occurred earlier than the date of the agreement to separate, it could call for corroborative evidence – as suggested, indeed, by Judge Inglis QC.

In *In the Marriage of Macaulay* [1984] NZ Recent Law 14, Judge Inglis QC permitted the wife, who lived in New Zealand, to adduce the husband's evidence by affidavit in support of their joint application for dissolution. The husband had been sent a draft affidavit by the wife's solicitors in the expectation that he would swear it as it stood, and the Court observed that there could be situations in *which* such an approach could seriously affect the weight to be attached to the factual material testified to in such an affidavit.

Because the gounds for dissolution related to matters which were usually within only the parties' own knowledge, credibility would always be an important issue. There was, it was said, an obvious difference between a deponent who adopts as his testimony what has been prepared for him by an interested party, and a deponent who provides his own testimony as to the relevant facts for use by an interested party.

Personal service

A similar strictness is to be found in the matter of personal service. In *Edmondson v Edmondson* (1981) 2 NZFLR 307, the wife maintained that personal service according to the Rules[14] was not possible as her husband was living in Australia, occasionally writing to the children giving a Parramatta Post Office address but never revealing a home address, so that it was not known if he lived in Parramatta or merely worked there. She did not know of anyone on whom the application might be served with the likelihood that it would be forwarded to him, and believed that the best way for effecting substituted service would be to advertise her application in "The Australian".

The file showed that the wife had earlier applied for orders under the former Domestic Proceedings Act 1968 and had also obtained an order for substituted service to be effected by posting her application to the defendant at a Parramatta Post Office Box Number. Also on the file was an Advice of Receipt Card showing that her husband had received them.

Judge Trapski observed that there was no indication why the present application could not be similarly served; that there was no indication of how long ago the husband wrote to the children, or any detail of that correspondence; that there was no indication of whether maintenance was being paid as ordered in 1980. His Honour pointed out at p 308 that:

> Dispensing with personal service of an application for dissolution is a serious matter. A dissolution order affects not only the rights of the parties but also their status and there is no jurisdiction under s 173 [of the Family Proceedings Act 1980] for a rehearing. . . . Here there is insufficient information to satisfy me that the suggested method of bringing the application to the notice of the [husband] will be effective. . . . I consider that further inquiries should be made as to the whereabouts of the [husband]. I decline to make the orders sought until further information is available. In particular, I would like to know why the application cannot be served in the same way as the application under the Domestic Proceedings Act.

In *Kung-McMinn v Kung* (1983) FLN 4 (2d); [1983] NZ Recent Law 359, the wife applied for an order authorising substituted service of an application

for dissolution by sending a copy of it by registered post to the husband, who lived at a known Swiss address. The real reason for the application was the cost of personal service in Switzerland, but it was also said that, because English was not the native language of Switzerland, there might be difficulties if the husband was required to be personally served. This case also came before Judge Trapski, who said that, while it was not mandatory to obtain an order to allow service of a dissolution application overseas, as s 157 of the 1980 Act was permissive and not obligatory, proof of personal service on a respondent was even more important under the 1980 Act than under the previous legislation. Under the 1980 Act, he observed, an order in undefended proceedings takes effect as a final order on being made, no appeal lies against it and no rehearing is possible, so that a change of status "is effected immediately and irrevocably".

It was evidently also suggested that a letter could be written to the husband asking him to sign an acknowledgment of service and to return it to the Court. In the Court's view this got the matter no further. Rule 44(4) of the Family Proceedings Rules 1981 states that, unless the person served is personally known to the person serving the document, a mere acknowledgment is not sufficient evidence of identity. If the suggested means of service were accepted, the Court would be without the independent corroboration of identity and service which seems to be an integral part of Rule 44. The possibility of forgery could not be overlooked.

Even bearing in mind that the balance of probabilities is the standard of proof required by s 167 of the 1980 Act, the Court is entitled to be assured that the respondent is aware of the allegations that are made, and that the marriage to which he is a party is to be dissolved, and when, irrespective of whether he wishes to object or not. Furthermore, His Honour saw no reason why the standard of such assurances should be less than they would be if the respondent resided in New Zealand merely because he resided outside New Zealand. The application was thus declined.

Dissolution clarified

The following comments have been added to the article as the writer has been overtaken in the press by an important decision on the matter of dissolution of Barker J. It is *Russell v Russell,* High Court, Auckland; judgment 16 October 1984, No M974/83. It is thought to be the first appeal to the High Court of any real consequence against an order dissolving a marriage since the Family Proceedings Act 1980 came into force.

The facts were that the parties had married in 1965 and separated in 1974, having adopted twins in 1968. The respondent husband took up with a de facto wife in 1979 and had two children by her. The appellant wife asserted that, despite the long separation, she still wanted to return to her husband and was willing to take on his ex-nuptial children as if they were her own. The de facto wife testified that the relationship between her and the respondent husband was excellent and that they intended to marry when free to do so.

At this stage, one must turn to *Marinkovich v Marinkovich* (1983) FLN 88 (2d). The spouses in that case had separated in 1980, the wife moving out because of the husband's involvment with work and sports, which kept him away from the family for lengths of time which were undue. His business failed. He suffered a serious accident. He recognised his shortcomings and sought counselling. He visited his wife and children weekly. Throughout the period of their separation, however, the wife was adamant that she would not resume the marriage and shut her mind to counselling. Thus, throughout the two-year living apart period required by s 39(2) of the Family Proceedings Act 1980 she was unilaterally – for the husband did not consider the marriage to have broken down – looking upon the marriage as over.

The case was clearly one where an adjournment for reconciliation or conciliation purposes under s 19(2) of the 1980 Act would not have achieved anything. The Court held that the fact of living apart for two years in itself established irreconcilable breakdown and that, unless there was a reasonable possibility of reconciliation under s 19(2), the marriage must be held to have irreconcilably broken down. An order dissolving the marriage was accordingly granted.

The Family Court Judge in the case under review followed the *Marinkovich* case, supra, observing that the question of irreconcilable breakdown was rarely justiciable. He dissolved the marriage, and the wife, who had defended the case in the lower Court, appealed to the High Court, pursuant to s 174 of the 1980 Act, against the dissolution of the marriage.

The first point, therefore, that Barker J had to decide was whether s 39(2) of the 1980 Act should be interpreted, as it had been in the *Marinkovich* case, supra, as if the living apart for two years per se established irreconcilable breakdown. He considered that what had been said to the opposite effect in *F v F* (1982) 1 NZFLR 449, at 450 per Judge Bisphan, and in *Barker v Barker* [1983] *NZ Recent Law* 327; (1983) FLN 86 (2d) by Principal Family Court Judge Trapski, was logical and correctly stated the inquiry that must be undertaken by the Court. Accordingly it had been wrong for the Court below in the present case to say that mere proof of living apart for two years entitled the husband to the dissolution order he sought. The *Marinkovich* case, supra, is thus overruled on this point.

The second matter upon which Barker J had to pass was this: the Court below had formed the view that there was no possibility of reconciliation because of the period of years that had elapsed since the appellant and respondent had separated and because of the respondent's present domestic situation – and hence it had considered that there was no possiblity that an order under s 19(2) would promote reconciliation between them. Counsel for the wife submitted to Barker J that s 19(2) was directed to the Court's role of fostering reconciliation and conciliation and that this role was distinct from the Court's duty under s 39 to grant a dissolution order when the sole ground for so doing had been made out. Counsel put it that it was an error of law to equate a finding of no possibility of reconciliation with a finding that the marriage had broken down: see *Ash v Ash* [1972] 1 All ER 582, at 586, per Bagnall J, a passage commented on by Judge Trapski in the *Barker* case, saying that the issue of irreconcilable breakdown was one to be decided not simply on the assertion of one party, but judicially.

Counsel for the husband

countered with an argument that the finding of the Family Court Judge that there was no possibility of reconciliation, albeit within the context of s 19(2), did amount to a finding that, on the totality of the evidence, the marriage had broken down irreconcilably. He put it that the Court below had not merely made a finding that there was no reasonable possibility of reconciliation, but that, having heard all the evidence, it had reached the positive conclusion of irreconcilable breakdown. Barker J held there to be ample, indeed almost overwhelming, evidence on which the Family Court could have so concluded. The parties had now been separated for ten years (and for nine years at the date of the hearing before the Court below). Moreover also, the husband had been, and, indeed, still was, living in a de facto relationship which had produced two children and he had shown, by applying for a dissolution, a determination to end what he regarded as a failed marriage.

Barker J went on to say that the Family Court, by its finding under s 19(2), had found not merely that there was no reasonable possibility of reconciliation but also that the marriage had broken down irreconcilably. In reaching this conclusion, the learned Judge did not ignore the submissions of counsel for the wife that s 19(2) had a wider purview than s 39, and continued thus:

> However, s 19(2) in its terms specifically relates to dissolution proceedings. If there is no possibility at all of reconciliation – as distinct from a reasonable possibility of reconciliation – then that amounts to a finding that, in all the circumstances of this case, the marriage must have broken down irreconcilably. It is clear that the [Family] Court Judge went through the *Ash v Ash* exercise and came to his view that there was no possibility of reconciliation not merely on the assertions of the parties.

Hence, although the wrong test had been applied in the Court below, its decision was the only one available on the evidence. The appeal was accordingly dismissed with no order as to costs.

Cases of this type are, inevitably sad, for one spouse is saying that he or she has a continued commitment to the other spouse and does not consider the marriage to be broken down at all, or, if it is broken down, not irreconcilably so, while the other is displaying a conflicting attitude ie is saying his or her mind is resolutely set against reconciliation, being of the opinion that the marriage is over. Indeed, the Court dissolved the marriages in such circumstances in *F v F*, supra, and in *Barker v Barker*, supra, and *Phillips v Phillips* (1982) FLN 112, where the husband, as in the case under review, was also planning to marry again.

It must not, however, be forgotten that, as Barker J observed, it could be that a marriage has broken down irreconcilably, but, because of s 39(2) of the 1980 Act, the Court cannot hold that the ground for dissolution has been established because the parties have not been living apart for the two years immediately preceding the filing of the application for dissolution. In the course of his judgment, however, his Honour indicated that the *Marinkovich* case had rightly held that "living apart" had the same meaning as under the earlier legislation.

Conclusion

It is submitted that the above cases show that all due care is being taken in applying the substantive and procedural law to applications for dissolution of marriage. It can be justifiably said of the New Zealand Courts that there is no such thing in them as a "quickie divorce", or "divorce on demand" or "divorce by fast track" or by any form of "special procedure". "Divorce on the affidavits" is, as shown above, extremely rare. □

---

1 No doubt the domicile question arose because the husband would have stated in his application that he was domiciled in New Zealand and that he was living apart from his wife. It would also have become apparent to the Court from the papers that the wife was not resident at a New Zealand address.
Practice Direction 2.3 (for which see Butterworths *Family Law Service*, p 9901) states that, following the normal investigatory role of the Court, in undefended or joint applications, the Judge will conduct the inquiry into the matters about which the Court must be satisfied. If there are any special or unusual aspects to an application, counsel should advise the Judge of these prior to or at the commencement of the hearing; counsel will then be given the opportunity of leading this evidence. A prepared brief of evidence is usually inappropriate to an investigatory hearing and will not (other than in exceptional circumstances) be received.

2 See Black, *Dissolution of Marriage* [1980] NZLJ 402.

3 See s 38 of the 1980 Act.

4 This implies that this is the order in which a Court would expect counsel to deal with these matters in a defended case in which there was no preliminary issue as to jurisdiction in the conflict of laws sense.

5 A point made in *Pheasant v Pheasant* [1972] Fam 202, 206; [1972] 1 All ER 587, 589.
It is submitted that it is too strong a thing to say that once the "living apart" has been satisfactorily proved to have lasted for the required period, irreconcilable breakdown may be inferred or presumed by the Court.

6 See his Riddell Lecture, *"Recent Developments in the Matrimonial Law"* (1970), reprinted in the 11th edition of Rayden *on Divorce*, p 3232.

7 Judge Trapski relied on *Ash v Ash* [1972] Fam 135; [1972] 1 All ER 582, which appears not to have been cited in the *Beard* case, supra. See also *Katz v Katz* [1972] 3 All ER 219, 223.

8 Viz, the *Pheasant, Richards* and *Ash* cases.

9 Concluding rightly, it is submitted, that those words had the same meaning as in the earlier legislation. There can be no doubt at all on the facts that the spouses were "living apart" and had done so for the required statutory period by virtue of the wife's all-pervading unilateral decision that the marriage was over.
The concept of "living apart" does not seem to have caused any particular difficulty since the 1980 Act came into force: see *Dorf v Dorf* (1982) 1 NZFLR 331 (CA) (strictly speaking, concerned with the Matrimonial Property Act 1976); *Douglas v Douglas* (1983) 2 NZFLR 23 (dissolution refused in undefended case, with reluctance, the prerequisite two years' "living apart" not being met); *Laws v Laws* [1983] NZ Recent Law 165 (couple slept in different rooms, no evidence of intent to end marriage and no other alteration of the consortium, held "living apart" had not commenced) Cf *Batchelor v Batchelor* [1983] NZ Recent Law 165. As to resumption of cohabitation, see *F v F*, supra.

10 Supra, and thus accept the *Pheasant, Ash, Katz* and *Richards* decisions and that it is not right to equate that animus which is an essential ingredient of "living apart" with irreconcilable breakdown.
Cf *Savage v Savage* [1982] Fam 100; [1982] 3 All ER 49.

11 In *Little v Little*; Family Court, Levin; FP 031/61/83; 9 Sept 1983. An adjournment is always possible under s 19(2) of the 1980 Act for the purposes of reconciliation or conciliation in an appropriate case. And, under s 162(1) indeed, it is open to the Court to appoint a barrister or solicitor to assist it or consider the legal representation of a child.

12 In the *Little* case, supra. The finality of an order is well brought out in *Manchester v Manchester* [1983] NZ Recent Law 277 by Sinclair J. That a dissolution order affects status appears from *Thynne v*

Continued on p 91

Mr Justice Moller — A tribute from the Auckland District Law Society President

Tomorrow Your Honour comes to the end of your term as the holder of the important office of one of Her Majesty's Judges of the High Court of New Zealand. The Auckland District Law Society has sought and been granted this special sitting of this Court at which publicly to acknowledge your many years of distinguished service.

Let it be recalled sir that you were born in Dunedin in 1913 your forebears being Danish. Your scholastic years were notable for outstanding achievements both academic and on the sporting field. You were dux and head prefect of Otago Boys High School. At Otago University you obtained your boxing blue and were a member of a winning Joynt Scroll debating team. To the surprise of none you were awarded a Rhodes Scholarship in 1935.

Along with the activities already mentioned went an interest in drama and the theatre, an interest so profound that the young Moller may well have been for a time tempted by the prospect of a career in which he exercised his skills of eloquence in some arena other than the Courts of Law. But however much other possibilities may have beckoned Your Honour's allegiance to the law held firm.

Following your return from Oxford to New Zealand you practised from 1939 to 1953 in Invercargill. You were President of the Southland District Law Society in 1946-47. I interpolate here that I have been charged by the present President of the Southland District Law Society, Mr Peter Galt with the responsibility of conveying to Your Honour the good wishes of the members of that Society. I have been particularly requested to tell you that Invercargill retains the memory of you as a man well-liked and highly respected by both the legal profession and the broader community.

In 1953 you came to Auckland to join the prominent firm now known as Wallace McLean Bawden & Partners. It is a mark of the esteem in which your contemporaries held you that in 1957, having been practising in Auckland for only about four years, you were elected as a member of the Council of the Auckland District Law Society. You became President in 1963 a year in which the Auckland Society was host to the New Zealand Law Society's triennial conference. Many men have of course served as president of one district law society but it is a very rare achievement indeed for one man to attain office as president of two different district law societies.

In 1964 amidst universal acclaim you were appointed to the High Court bench. It is not of course possible in a mere couple of sentences to sum up two decades of judicial work in any satisfyingly comprehensive way but perhaps I might venture these observations. The hallmark of Your Honour's judicial technique had been the precise and meticulous taking of pains. You have required Counsel appearing before you to carry out their functions with the same conscientious care that you have applied in the exercise of your own responsibilities. You have demonstrated the effectiveness as a recipe for achieving justice of the proposition that if a matter is worth litigating in the High Court at all then it deserves to receive from Judge and Counsel alike a careful deliberate and studied consideration.

And now your long period in office comes to a conclusion. Perhaps I may be permitted to say to you sir that the Bar has admired the courage with which you have done and are doing battle with grave ill health. As on behalf of the members of my Society I bid you farewell I express the earnest hope that it is with a sense of satisfaction and fulfilment that you look back on your long years of service to the law. □

Conference on medical law

Practitioners with an interest in the relationship between law and medicine and who are contemplating an overseas trip this year might consider attending the 7th World Congress on Medical Law. This Conference will be held at Gent in Belgium from 18 to 22 August 1985.

For some time Sir Charles Burns, who died recently, was a Vice-President of the Association. In more recent years Mr J D Dalgety of Wellington has been elected a Vice-President and is on the Management Committee.

The programme for the 1985 Congress is divided into seven general topics. These are: Medical Practice and Research; Right to Medical Treatment; Informed Free Consent; Medical Secrecy/Privacy of Information; Human Life Before, At and Shortly After Birth; Death and Dying; Liability (being what is known in America by the lovely name of malpractice suits.) There are many sub-topics.

Anyone interested in submitting a paper of up to 3,000 words is required to do so before 15 May and should immediately advise the Secretary-General Dr R Dierkens, Apotheekstraat 5, B-900 Gent, Belgium. Further details and enrolment forms are available from Mr Dalgety, Box 1291, Wellington. □

The District Courts

An interview with Sir Desmond Sullivan, Chief District Court Judge.

In the New Year Honours list Chief District Court Judge Sullivan, received a knighthood. He is retiring in April. His successor will be Judge Trapski as was noted at [1985] NZLJ 40. In this short interview Chief Judge Sullivan discusses the genesis and working of the District Courts system, his responsibilities as Chief District Court Judge of an administrative and quasi-political nature, and talks briefly of his own background and his judicial experience.

Were you the first person to have had the title of Chief District Court Judge?

Yes I was the first.

When did you take up that position?

December 1979, although the Courts came into operation in April 1980. I was appointed in December 1979 as the Chief District Court Judge and the idea at that stage was to have me appointed so that the District Court could come into effect basically on 1 April 1980.

Was this following on from the Beattie Report on the Courts?

Yes, the District Court had its genesis in the Beattie Report which of course was stimulated initially by the Speight Committee Report in 1974. There had been a few other committees of Supreme Court Judges in earlier years. The interim report of the Speight Committee got too involved with the idea of a Crown Court. At that stage the Law Society's main submission to the Speight Committee was that there should be a Royal Commission on Courts to look at the whole structure and not just do a patchwork job. The Labour Government was in power at the time of the Speight Report. . . .

Were you on the Speight Committee yourself?

Yes I was on the Speight Committee. The then Minister of Justice decided that he would do nothing regarding the Speight Report, but there was a change of Government in 1975 and as part of their manifesto was to have a Royal Commission, the Beattie Commission was formed. I think it did a tremendous job in restructuring all our Courts and giving an overall survey of what the needs were for many years in New Zealand.

As far as the District Courts were concerned, my recollection is that both the Justice Department and the Law Society made submissions to the Beattie Report recommending the establishment of such a Court. Was that so?

Yes, at that stage the climate seemed to be that there should be a Court with greater powers than the Magistrate's Court had. The Supreme Court Judges were anxious to rid themselves of what they called the minor jury trials so that they could really deal with more serious crime and in effect become a Court of appeal and review. The Magistrates for their part felt that a lot of their work was a waste of Judicial manpower and that they were dealing with many matters which could have been dealt with by a Small Claims Court or by Justices or Registrars.

Has the existence of the Small Claims Tribunal and the increased activity of Justices of the Peace made a marked difference to the work of the Court?

Well the Small Claims Tribunal in the civil field, yes; and with the extended jurisdiction up to a $1,000 that will obviously mean a lot of change. Many claims will be taken out of our Court. In fact if a claim within the jurisdiction of the Small Claims Tribunal comes before the Court, it is quite common to refer it down to the Small Claims Tribunal. With regard to Justices well, the District Court would not function if the Justices didn't have the powers and the jurisdiction to do the many traffic offences that they are doing. We would be bogged down with those cases, and particularly in Auckland where they have heavy defended traffic cases. In fact Justices in most towns in New Zealand are doing defended traffic cases. They are doing a tremendous job and we could not manage without their help.

Do some of the traffic cases still come before District Court Judges?

Wellington probably is about the only main centre and there seems to be some obstruction to the use of Justices here. I would say Wellington stands out on its own. The rest of New Zealand is doing defended traffic cases.

As a result of the establishment of the District Courts, was there an increase in the actual number of Judges?

The present strength is 87 and there is legislation now before the House to increase the number by five that will make it 92. There is quite an upsurge in numbers mainly because of the increased jurisdiction with jury trials, the almost exclusive jurisdiction in the Family Court, the increased civil work and the considerable amount of work in the

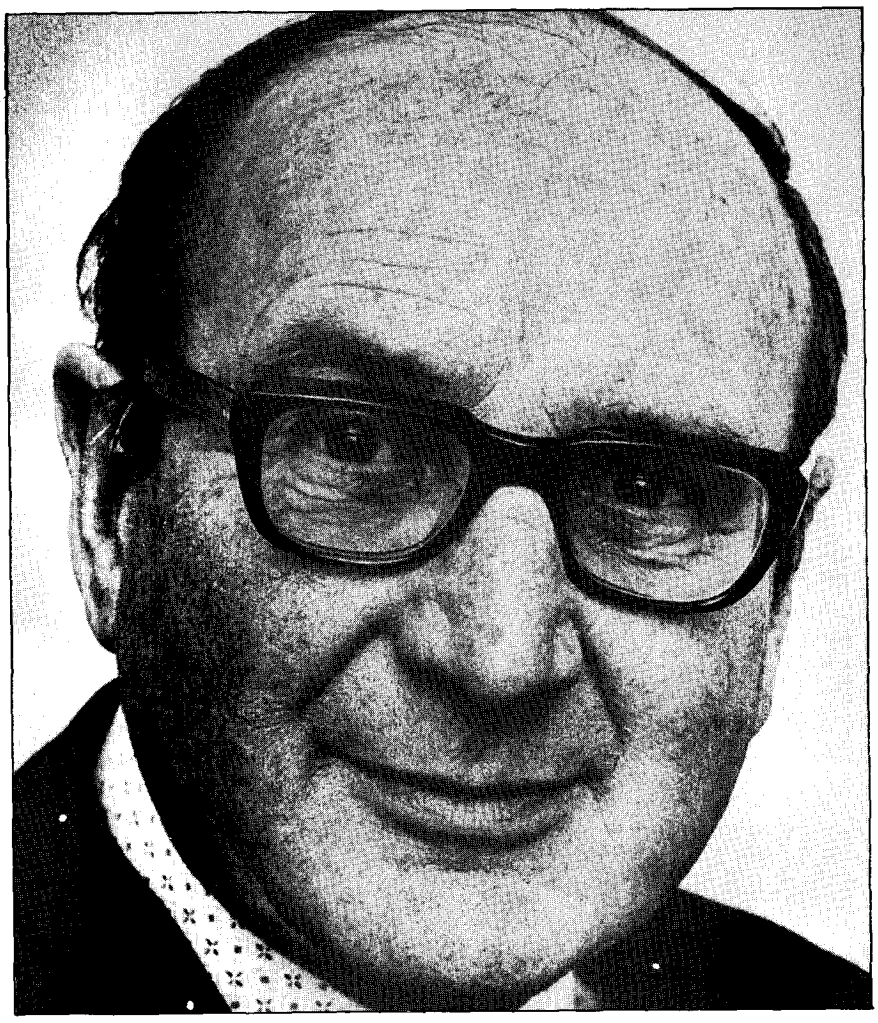
tribunal and administrative divisions.

The Family Court of course got some of the work that used to be done in the High Court too, didn't it?

Yes exclusive jurisdiction for dissolutions. In matrimonial property even after the creation of the Family Court most of the matrimonial property cases were still going to the High Court for some years but now the percentage is about 85% of such claims are heard in the District Court.

Looking at it from your particular situation over the last few years, how has it seemed that the extended jurisdiction has worked. Have there been difficulties or has it worked well?

The difficulties have been only in respect of legislation and facilities. We found that everybody envisaged that jury trials could have been carried out in some of the centres like Henderson, Otahuhu and Lower Hutt, but we found at the time we wanted to do it that we had got meshed in a legislative snarl up with jury boundaries. We had to get legislation rushed through to ensure that jury trials could continue to be heard in these places. That's being wise after the event. In the main the extended jurisdiction has gone very well. There have been very complimentary comments on the standard of performance of all Judges in the extended jurisdiction. One of the big difficulties has been facilities. For instance, we have sufficient Judges to be doing four jury trials a day in Auckland, but we only have two jury Courts, although there are Courts available at the High Court. For some administrative reason we cannot use them so trials are delayed unnecessarily. In Wellington we have the earthquake risk which precludes use of some Court buildings. And in the south, Dunedin and Invercargill, elections for trial by District Court Judges and juries has just now taken off. That's a problem that the new Chief Judge will have to meet. In some areas jury trials have increased dramatically and in others they have dropped off. To some extent I think it depends on the personnel in the particular region.



Sir Desmond Sullivan

When you say personnel, do you mean the profession rather than the Judges?

Yes, the profession. I believe that if more senior counsel were engaged in some of these trials they would realise that the offenders are whistling against the wind in many of these cases. On the other hand one is left with the firm impression that many of the junior barristers rely on the legal aid, miserable as the scale is, to eke out an existence. On the other hand we need them, we need representation in Courts for the defendants.

One of the big changes of the specialised jurisdictions has been the special warrants for some Judges and not for others. Has this led to first-class and second-class District Court Judges, in any sense at all?

Well it is a matter of ribald comment amongst the Judges that those in general jurisdiction are known as the rump Judges. It is my hope, and I endeavour to extend the number of Judges exercising jury jurisdiction. I think that every Judge really should have a warrant to preside over jury trials because it would improve his own performance in all criminal trials. I have progressively done that and the number of the Judges who now can operate jury trials is increasing every year. In the Family Court I think you have got to have a special feeling or interest or a yen for the particular field. Unless you have got an empathy with it I think you are better out of it.

This raises the question of the training of Judges. Has there been any change in that, or is the position still that it is presumed that their experience at the bar provides all the training that is necessary?

I think that is one of the shortcomings in Judicial appointments. There is no real effort made to train a Judge. On appointment I supply them with material which I think is probably of some help and then they are

seconded to one of the metropolitian Courts for a period of up to six weeks to learn. But it is mainly a hit and miss method and I think that there should be some structured course for Judges particularly in the sentencing field.

What sort of structure?

Well I think something basically like some of the nodules from the criminology course at Victoria University or one of the other Universities should be made available. I realise the difficulties. Judges are appointed probably only one or two at a time over a whole year and I think time should be made available for newly appointed Judges to at least attend a series of lectures. Some years ago Dr Robson. . . .

Was that when he was Secretary of Justice?

No when he was the Director of the Criminology at Victoria University. He set up a pioneer, or a pilot, criminology course and invited a well known psychiatrist and myself to join a small class. When we commenced the year the psychiatrist reneged on the deal but I kept on. I felt it was very valuable. In fact as the course continued through its various stages at the University I continued through. I don't think you have to do that but I think some of the topics at stage 1 could form the core for a sentencing course of instruction for new Judges.

With the new jurisdictions, and allowing for the increase in numbers that has occurred, what is your experience of the Judicial workload now compared to the days when you were a Magistrate?

I think the workloads are far too high as far as sitting hours of Judges are concerned. I get statistics from around New Zealand and they are sitting for far to long each day when one has regard to the fact that there is probably as much paper work and many various duties to do before they go into Court and after they come out of Court. I think the stresses that are being placed on the Judges are too great. There is always this constant demand for rapid decisions, to know you are right, the public are more critical, the politicians ill-informed and critical – somewhat evangelical in their outbursts sometimes.

Have political outbursts been one of your particular responsibilities requiring you to speak on behalf of the Judges on occasions?

Yes I have had to rebuke the previous Prime Minister and other Ministers on some of the remarks they have made in public. Of course most of them have not been accepted by the target.

Did you find this a particularly unfortunate duty?

Well it is something I shouldn't have had to do. People in responsible positions like that should act responsibly and while one can understand the ill-informed public making these comments, one does not expect that of people who are holding high office. While I respect their right to make comments which are informed and helpful, I can't say that they were well-informed or helpful. I felt it was my duty as Chief District Court Judge to point this out. In many cases it was poorly drafted legislation or inept prosecutions which created the situation, but the Judges had to bear the burden of the criticism.

The Courts have been under some public scrutiny and criticism quite apart from the comments by politicians. Has this been particularly noticable as pressure on the Judges?

I think there has been a pattern by various protest groups to try and intimidate the Court by their protests or by their conduct in Court, by their appearance in Court, by their uniforms. This probably reached its height during the Springbok tour when it was sad that many well-respected and good citizens found themselves in a situation of being defendants in a Court caught up by the hysteria of the moment and misbehaving in public. In coming into Court, and because the police in the main laid the informations jointly, you had a proliferation of defendants with witnesses and friends packing the Court and the behaviour was such that the Courts were in danger of not being able to cope. One of the Auckland Judges really put his foot down and order was restored. It was a real challenge to our authority at a time when we had limited powers of committal for contempt.

I have heard this described as an attempt to turn the Courts into a theatre. Is that a fair description of what happened in New Zealand for a time, and is it still a risk or problem?

I think the Courts have always been a theatre and you as a barrister would know that, but I think there is a difference. I think that what they did attempt to do was to find a public forum for their views which would be published in the newspapers. To a large extent the media did give them the coverage they wanted. Towards the end even the media got fed up with it and stopped reporting their remarks. It is significant that one of our Wellington District Court Judges allowed one defendant to state his political views in one of these joint protest trials and then made an order suppressing the entire submission. The remaining 12 defendants in the case who were also wanting to have their views reported, faced with the fact that it was not going to be published refrained from making any statement. That confirmed our view that they were using the Court for their own ends.

You were for a considerable period a Magistrate before the District Court was established. Would you comment on the standard of counsel you have experienced over the years?

When I first came to Wellington in 1966 there were only four Magistrates, Scully, Thomson, Jamieson and Wicks. They were outstanding men, not only as lawyers but as Magistrates so as junior I was very fortunate. Now in those days it was common, in fact it was everyday practise to see the senior members of the Bar – all the senior Bar – appearing in the Magistrates Court. But today to see the senior Bar in Court is a rarity, even the intermediate Bar are no longer appearing in the District Court in its summary jurisdiction. To some extent it could well be that the number of cases which are being defended with very little merit in the defence, results from the fact that more senior members of the Bar who could overbear their clients in

these matters, or inform them that they weren't going to waste their time advancing defences which had little merit or no merit are not appearing. Maybe that is the reason for taking up the Court's time so much. On the other hand, in Auckland where I did a week's civil trials recently, many of the cases had been sent down from the High Court to the District Court for hearing. As a result of the larger claims I had better pleadings, more senior counsel were appearing and it was a pleasure to have good counsel advancing good arguments so that by the end of the day you were practically driven to the conclusion without having to reserve your decision.

Are you saying in effect that there is a marked difference between the handling of civil litigation and criminal?

Well I think that in the larger claims it is quite apparent that more senior or intermediate counsel are coming to argue these claims and they are being argued properly rather than the practice with our limited civil jurisdiction which had grown up of very poor pleadings and very junior counsel putting the case together and letting you find out what the law was. I believe junior counsel would profit from sitting in the back of the Court and observing how the senior Bar conduct cases. This is the way to learn how to present a case and how to behave in Court.

Do you find that there is a difference on a geographical basis in different parts of the country, or is there a fair degree of uniformity in the legal profession?

I'd say that the further south you go the more senior and more professional are the counsel who are appearing.

One of the things that was referred to in the Beattie Report was a proposal for a Judicial Commission. That has not been established in a formal sense but I think it is generally understood that much the same sort of group does meet on an informal basis. Is that correct?

Yes once a month the Chief Justice, the Secretary for Justice, President of the Law Society, Solicitor-General and I meet over a very informal lunch. There is no agenda, no minutes are kept, everyone is entitled to raise anything they want to at that meeting. I think its informality is its strength.

Have you found, as Chief District Court Judge, that such a meeting is helpful?

Yes very helpful. If I have any particular matter affecting the District Court that is someting I can raise. If I have got something I want to raise about the Crown Counsel throughout New Zealand, I can mention it on an informal basis without having to make a formal complaint or send a formal letter to the Solicitor-General, similarly to the Law Society and likewise to the Chief Justice. Anything which may be of current concern is discussed, from procedures on jury trials to criticism made on appeals from District Court Judges. It is complementary. If they have got matters they want to raise about District Court Judges they do so. We are absolutely frank with one another. In the end we try and resolve these matters on an informal basis without making a Hollywood production of it.

Where did you start in practice?

Westport. I obtained a rehab loan, being a returned sailor, and bought Ben Scully's practice.

So you really followed in his footsteps in more sense than one.

Yes and they are good footsteps to follow too.

Where did you do your degree?

At Canterbury. I went to Timaru Marist, Timaru Boys High and then worked in the Public Trust in Christchurch and did my degree part-time as everybody did in those days. The war came as an interruption from 1940 to 1945. I served in the navy, returned to Christchurch, completed my degree and went to Westport.

And after Westport?

I went to Palmerston North where I was to join some chap's practice but that didn't work out. I started on my own and was in practice there for about seven years, until 1966 when I was appointed to the Bench.

How have you found your years on the bench?

Well coming from practice it was tremendous. The variety of experiences that you were meeting each day made it so interesting that it was a delight to be doing the work. For a period of 18 months I was the sole Magistrate doing domestic cases in Wellington. That was a particular interest of mine. I had been a foundation member of marriage guidance. It gave great job satisfaction. Probably I had too much of a diet of it, but it was something I was interested in. You felt you were doing something for people and that was reinforced by the occasional message you got from some litigant who had sent you a Christmas card or a message at some stage. After 18 years I think that's too long a term on the bench. I think that Judges at the end of 15 years should consider retirement. I think you get to the stage where you generalise far too much. The job isn't as interesting and as challenging as it was, you don't get the same satisfaction out of it and that is why I am retiring early. I think that I have done my dash and somebody else can take over.

How would you summarise your Judicial experience?

I don't want to sound pompous, that's not me, but the District Court offers you an opportunity to serve your fellow man. In some way it is an opportunity for you to help people. I only hope that I will be judged as I have judged other people. □

Continued from p 86

Thynne [1955] P 272; [1955] 3 All ER 129 (CA). Judge Inglis QC, further observed in *In the Marriage of Macaulay* [1984] NZ Recent Law 14, that an order for dissolution affected status and could not be safely regarded "as a mere formality".

13 In the *Little* case, supra. His Honour had in mind ss 161 and 162 of the 1980 Act. He also noted that breakdown, irreconcilability and "living apart" must each be proved, the standard of proof being set by s 167 – on the balance of probabilities.

14 See the Family Proceedings Rules 1951, Rules 27(2), 41, 42 and 44, in conjunction with s 157 of the 1980 Act, (as amended by s 2 of the Family Proceedings Amendment Act 1951).

Interview with Peter Clapshaw

As from 1 April 1985 Mr Peter Clapshaw of Auckland will become President of the New Zealand Law Society replacing Mr Bruce Slane whose term of office is ending. In this interview for The New Zealand Law Journal *the new President speaks about his background and experience in the law and other fields. Without attempting to foretell the future Mr Clapshaw refers to the attitude with which he approaches his new responsibilities.*

I understand, Mr Clapshaw, that although you have spent your professional life in Auckland, you were not in fact born there.

No, I was born in Wellington. But I left Wellington when I was only one year old, so I have no early recollection of that city. My family moved to Christchurch where I first went to school. We then moved to Dunedin and I had some more of my schooling there before moving to Auckland where I attended Auckland Grammer and then Auckland University.
I graduated in 1954, with an LLB degree. I did the degree part-time. I think I would have been one of the last of those who did the whole of their degree on a part-time basis. I well remember having to get up to the University for early morning lectures at 8 o'clock and then having lectures from 4pm to 8pm on some days.

Were you working in a law office, or did you have some other form of occupation during those years?

I was working in a law office. My first employer was J S Burt – the firm which is now known as Burt Moodie Goold & Francis. D R (Don) Harris was the law clerk there when I started and he was an excellant teacher. He later went to the UK and became a don at Oxford. I later worked for Morpeth Gould Wilson & Dyson for several years before joining David Coates in Simpson Coates & Clapshaw which has since grown into Simpson Grierson.

Would you tell us something about your family?

I was married to my wife Helen in 1956. We have two daughters aged 27 and 24. Deborah is a lawyer in practice in Auckland and Virginia is a nurse in Christcurch.

Have you taken an active interest in the field of sports?

Yes, I played hockey and cricket at University and I have also taken an active interest in sport administration. I was, for a period, chairman of the Auckland Hockey Association. My present sporting activity is golf and I am the honorary solicitor to both the Auckland Football Association and the Auckland Hockey Association.

You do have quite an involvement in matters of business. To what extent is this the result of your legal work, or did it have some other basis?

It arises out of my legal work – I also had an interest in business because of my father's involvement in the retail trade. He used to discuss business matters with me and I became interested because of that. I have been fortunate enough to have had some opportunities to become involved in business as a company director arising out of the practice of law and I have found them very interesting and challenging.

Do you see yourself now as mainly a businessman or mainly a lawyer?

I certainly don't see myself as a businessman because I do not regard my training as being adequate to conduct a business. I think my legal training has enabled me to make a contribution at board level. I see myself primarily as a lawyer – certainly not an academic lawyer – with a leaning towards broad business interests.
I served on the Auckland Council for about ten years and was President in 1982/83.

Were there at that time any major issues that the Auckland Council was involved in? Does anything still prey on your mind?

Nothing particularly preys on my mind – I try to be reasonably relaxed about things. No, I don't remember any single issue. We went through a period when the volume of complaints were a bit of a problem and unfortunately we also experienced one or two major defalcations in the Auckland District. My main interest while I was on the Auckland Council was on the financial and audit side. I was convenor of the Society's Finance Sub-committee and to the extent that I made a contribution it was more on that side of the Society's activities than any other. At various times I was involved in most sub-committees excepting common law which they wouldn't let me in on!

That involvment in the Auckland Council would have involved you also in the New Zealand Law Society presumably?

Auckland is entitled to four delegates on the New Zealand Law Society Council. During my last four years of service on the Auckland Council I was an Auckland delegate to New Zealand. I then served a further year as the Auckland nominee for New Zealand Vice-President.

You actually have already had five years.

I have had five years on the New Zealand Council and two years on the Executive Committee because the Auckland President serves as a member of the executive and the Auckland nominated New Zealand Vice-president is also a member.

What years would those have been?

From 1979 to 1984.

One of the things that sometimes concerns some practitioners is that Auckland is now so large as a district that it has a predominating influence on the Council of the New Zealand Law Society. Did you find that was so?

It cannot be denied that the Auckland Society has a considerable influence on the New Zealand Society. Where voting is by poll Auckland combined with one of the other larger societies or even one of the smaller societies can almost carry the day. Auckland, over the last few years has become very sensitive to that and uses its rights to call for a poll very sparingly. There are some issues where a poll is appropriate. After all Auckland only has its voting strength because of the number of practitioners that it represents.

During the five years that you have been active at New Zealand Law Society level were you involved in looking at legislation?

No, I have not had much to do with new legislation issues.

What sort of work were you particularly involved in during the period?

I was on several committes dealing with my work on the Council. I was a member of the Costs and Conveyancing committee, and I have been a member of what was originally the Joint Audit committee and is now the Joint Audit Board for about five or six years, the last two or three years as Chairman. I was a member of the Disciplinary Tribunal but I retired from that position upon my election as President-elect.

As far as the actual Council work is concerned was there anything in particular during that period of five years that you were a member of specific interest to you?

The Council only meets four times a year so the detailed work tends to be done by the Executive Committee and the various Standing Committees. I was on the *ad hoc* committee which made submissions to the Richardson Committee arising out of the findings of the Stewart Royal Commission. The Law Practitioners Trust Account Bill now before the House arises out of the recommendations of the Richardson Committee. We also made submissions on that Bill and as a result it will be much less onerous for the profession than might have been the case otherwise.

How do you see the functions of office of President of the New Zealand Law Society at the present time?

The office of President is one thing, the way in which an individual carries it out is another. Obviously representing the profession involves considerable responsibility. Individual holders of the office in the past have had their own individual way of carrying out those responsibilities and I expect my performance will reflect my personal strengths and weaknesses. I consider myself a pragmatic sort who normally adopts a low profile. I don't anticipate that my role as President would change that. I accept that some public appearances are necessary. Prbably there will be more than I would naturally and normally seek.

It would generally be considered now that the office of President necessarily involves a continuing and substantial relationship with politicians. Have you had any dealings with politicians on a large scale before?

Not on a large scale. I've had some minor dealings but it would not be true to say that I have had a great deal of experience dealing with politicians. I have met and know a number of the politicians that I am likely to be involved with and I believe I already have a reasonable relationship with them. I do agree that with the current state of the law affecting the profession it is necessary to have a close acquaintance with those who are going to make the rules which will affect us. Bruce Slane has developed that side of things to a very great extent and has been very good at it. It is something that I will have to do my best to continue.

Have you ever been directly involved in politics?

No.

The Rotorua Conference was one that was almost devoted to the idea of change in various ways. Are we tending perhaps to overdo a concern with change?

Basically I think I am a very conservative person. Nevertheless we have to recognise that there are demands and concerns, particularly consumer demands, which are much more pressing now than in the past. Experience both in New Zealand and overseas demonstrates that we ignore these pressures at our peril and we must be prepared to accommodate them in some way. The skill or the art seems to be to accommodate them in a way that preserves as far as possible the traditional professional approach and at the same time satisfies what the need is for some change. How far it is desirable to go to preserve both the public interest and that of the profession is the issue.

Have you had practical experience of what is going on in Australia or England in the legal profession?

I have had discussions with people involved in law society affairs in both places, but no, I wouldn't claim to be particularly close to what has happened. I have read newspaper accounts of the problems that they have had in England and Wales.

Would you agree though that what happens in England or in Australia in particular does tend to have a flow on effect?

It seems to be inevitable that these things move on and that overseas trends will be repeated here. No doubt it will continue to happen.

Have you been involved in the international legal organisations like, IBA or Lawasia?

I have attended various overseas conferences and I am member of the International Bar Association. I am not personally a member of Lawasia. I am a member of the IBA Committee on building societies, but I have not taken on any responsibility in any of those organisations.

Would you agree that the abolition of the conveyancing scale marks a major change in the life of the profession?

There is no doubt that abolition of the scale is a very major change for the profession. What its impact will be is yet to be fully demonstrated. It was a change that was inevitable

but I know that many solicitors were unhappy about it. A minimum scale is difficult to justify on a logical basis because it is really based on a swings and roundabout approach which can have inequitable results for some. I would hope that with all that has been done to prepare the profession for the change most members will by now have absorbed it without too much difficulty. While my current practice tends to be oriented more towards corporate and commercial work my belongings were very much as a general practitioner. The practice that I am in started as a small conveyancing practice and a large part of my working career has been involved in doing general conveyancing work. Although I am a little bit removed from it now I would like to think that I have still a basic understanding of what conveyancing is all about and the sort of problems that confront the ordinary general practitioner in a small practice.

Have you been particularly concerned about the question of advertising?

The basic decision to permit individual advertising has been taken by the New Zealand Law Society Council. I have to say that instinctively I have a distaste for individual advertising because I subscribe to the traditional professional view that advertising of professional services is undesirable. I know that this view is shared by others but I don't believe it can be sustained in this modern age. We must recognise that the practice of law is now really very much a business oriented activity as well as the practice of a profession. We have to be efficient to compete and to survive. We cannot ignore normal business practices and we must be prepared to serve the public by letting them know what services we have to offer. That involves advertising in some form or another.

Is it the form of advertising rather than the fact of it that will cause the difficulties?

Some people will have an initial difficulty in even accepting the fact of advertising although we have been doing institutional advertising now for a couple of years or so. The fears that people hold really are that ultimately we may get to the stage where individual firms are free to advertise without restrictions resulting in the tasteless sort of advertisements that you see in some overseas publications and in the United States. I sincerely hope that we never get to that in New Zealand and I think that it is most unlikely that we will. But I believe that advertising is a part of progress that we have to accept.

Both of these changes in professional life can be said to some extent to result from outside pressure. Do you think that there is a continuing or even greater need for public relations?

Yes. Under Bruce Slane the public relations side of the New Zealand Law Society and the profession generally has taken a giant step forward. Bruce has always been interested in public relations. It has been his specialty if you like, and I think he has done a great deal for the profession. To preserve the profession's image in the eyes of the public we have to have a good public relations policy and that now has to be an active rather than a passive thing. In the past it was assumed that because we were a profession everybody would know what we did and that they would like us. That has been proved to be unrealistic.

The election this time was contested by quite a number of candidates, wasn't it?

Yes.

Who were you nominated by?

I was a later starter. There were other candidates whose names were being mentioned as nominees long before my name was mentioned. The Southland Society inquired of me whether I would agree to my name going forward. I indicated that I would and I was nominated by Southland.

Do you think that parochialism is dying out?

I think the Council of the New Zealand Law Society now approaches issues very much on the basis of what is seen to be good for the profession in New Zealand as a whole. In my experience on the Council I would say that if there was a tendency towards parochial voting that has now largely disappeared.

From what you said at the beginning, it seems your professional experience has been fairly wide.

Fairly wide general experience. When I was younger I did a little bit of common law and I have even appeared in the Court of Appeal. My name is mentioned in the NZLR believe it or not, but my Court experience is extremely limited. Basically I have been a general practitioner whose work in recent years has been more on the commercial side. I am conscious of the fact that I come from a large city. I know one of the things that from time to time concerns practitioners throughout the country is that the leaders of the profession don't always adequately represent their point of view. There is a real concern that people from large city practices have a view which is really very much divorced from the sole practitioner in a small country town. I hope that always I will be able to keep in mind that my personal experience is not typical of all practitioners and that the Society does represent a very wide range of practitioners from large firms to small, from city firms to suburban practices and rural practices and also those employed by commerce and the state. I believe that my background is wide enough to enable me to perceive and cater for these differences.

How do you see yourself in relation to your new responsibilities?

I see myself basically as somebody who is pretty down to earth and reasonably modest. In most situations I adopt a low profile. I recognise that the office of President will require some things of me that will not come naturally but I don't see myself as changing my style or my personality at all. I make no claims whatsoever to academic ability. If I can say so without appearing immodest I regard my principal attributes as common sense and reasonable judgment. Those are the qualities that I hope to bring to the Presidency. I also have a strong committment to the maintenance of the independence and integrity of the legal profession. □

Books

A Commentary on Standard Conditions of Contract NZSS623: 1964

By R P Smellie QC. Published by Butterworths. ISBN 0-409-60080-6. Price $39.50

Reviewed by A A P Willy, Barrister of Christchurch

I have deferred reviewing this valuable handbook until an opportunity presented itself to test its utility in litigation.

The interpretation of the standard form building contracts has become almost Byzantine in its subtlety and complexity. It is not surprising that so few building disputes of any size reach the Courts, but when they do, the prospects for disputation are substantial indeed. What is surprising, is that these contracts were presumably designed by practical builders, engineers and architects to best serve their own ends. One has only to consider cases such as *New Zealand Structures and Investments Limited v McKenzie* [1979] 515 and *Fernbrook Trading Co Ltd v Taggert* [1979] NZLR 556, not to mention the recent and yet unreported decison of Cook J in *J & W Jamieson Construction Co Limited v Christchurch City Council* to realise that reliance upon these standard form contracts can be a hazardous business.

Robert Smellie QC's commentary on NZSS 623:1964 is a welcome ray of light to those who practise in this field. It has the merit of a commentary where the law is found adjacent to the contract text, thus saving precious time. It is concise and comprehensive, and above all, comes from the pen of an author who knows his subject intimately. In this field of often unreported and conflicting judicial prenouncements the value of this is considerable.

I believe that practitioners in this field of law will find this a necessary addition to their libraries. To those who only occassionally stray into this area, the book will serve as a timely warning of the difficulties which may be encountered.

The book is throughout written in a clear and simple style. The index and case table are adequate, and the copious use of headings is welcome.

It is to be hoped that the author and the publisher will see fit to regularly up-date this valuable work. □

Arbitration Court fixtures

The following press statement has been issued by the Registrar of the Arbitration Court at the direction of the Court.

The Arbitration Court's attention has been drawn to a recent case in the High Court where, in effect, counsel informed the High Court that a demarcation dispute could not be heard by the Arbitration Court for at least 12 months.

In the particular case, no papers had been filed with the Arbitration Court and no enquiry for an urgent fixture has been recorded.

It is true that the Arbitration Court has a large backlog of cases awaiting hearing. The Chief Judge made strong and urgent requests for an additional Court in February 1984. An additional but temporary Court is likely to be created soon.

But, the purpose of this memorandum is to reiterate what the Arbitration Court has said on a number of occasions, namely:

(a) That an urgent fixture when sought, will always be granted for matters of national importance;
(b) That urgent fixtures when sought, will always be considered where there is serious industrial action whether by strikes or lockouts;
(c) That an urgent fixture, when sought, is granted in suitable cases for demarcation disputes;
(d) That priority is given where possible to unjustified dismissal cases in which reinstatement is sought;
(e) Priority is being granted to matters under the current wage round pursuant to s 84 of the Industrial Relations Act (1984 amendment).

The Registrar will, on request, refer any application for an early fixture to the Chief Judge. Such request should be in writing supported by reasons. The Court may later give consideration to making a Rule covering the matter pursuant to s 62 Industrial Relations Act 1973. □

Book award

It has been announced that the J F Northey Memorial Book Award for 1984 has been awarded by the Council of the Legal Research Foundation to L H Southwick QC, A Dormer and G R Halford for the book *The Liquor Laws of New Zealand* (Butterworths). The award is a cash payment of $1,000. For 1983 the award was made to J Collinge for *Restrictive Trade Practices in New Zealand* (Butterworths). The award is made annually for the best practical legal work in form and content published during the year. □

Massage Parlour Licensing

By Donald Stevens, an Upper Hutt practitioner

This articles examines the objectives the legislature had in view in enacting the Massage Parlours Act 1978, the doubts expressed at the time of enactment as to the likely efficacy of the measure, the legislation itself and the manner in which it has operated.

Introduction

> If you licence you control. If you give the police power to enter you control. If you give the police the power to object to licensees you control. If you give the police power to object to employees, you control. . . .

With these words the present Leader of the opposition and immediate past Minister of Justice, the Hon J McLay, (then a government back bench member of Parliament) gave his support in 1978 to the introduction of licensing of massage parlours.[1] It was the intention of the Government that the Massage Parlours Act 1978 would ensure that parlours approved by the Court "after representations by the police . . . (would) be straight massage parlours . . . under the supervision of the police and under control of the Courts and the law."[2] The legislation would see an end to the "vice dens" that had existed thereto.

The Act has now been in operation for six years and few, if any, view it as having achieved the objectives aimed at.

The raison d'etre of massage parlour licensing

In 1978 the Court of Appeal held *R v Barrie* [1978] 2 NZLR 78 that in order to establish that a person kept or managed a brothel it was essential to prove that that person had control or a share of control over the brothel. A prostitute who merely worked in the establishment and who was not part of the management could not be described as a keeper. This decision ended a series of police prosecutions for brothel keeping brought against masseuses who worked in massage parlours without being involved in the management of the parlours. The decision removed from the police arsenal an important weapon in the fight against vice. The situation thereby produced was seen by one commentator, J M Afford,[3] as one of "some embarrassment for the police" who viewed the "law itself (as being brought) into disrepute". They were not slow to respond. Initially they contemplated an extension of the criminal law to render the operators of parlours vicariously liable for acts of prostitution occuring on the premises whether or not they were aware of such acts taking place. The proscription of prostitution itself was also considered. A tightening of the criminal law, however, was seen as being less effective and possibly unacceptable from a political and policy stand point. The solution of a licensing system was thus arrived at.

The Minister of Justice in introducing the Massage Parlours Bill to Parliament indicated that it was designed to deal with the "growing number" of massage parlours that were "merely fronts for people seeking to making a living from prostitution and drugs".[4] Moreover he claimed it had been found to be difficult, if not impossible, for the police to obtain sufficient evidence against such people of criminal offences.

Ministerial elaboration was provided on the second reading.[5] It was the view of the Government that there was widespread prostitution in massage parlours and that some owners were taking advantage of that situation in such a manner as to avoid offending against the brothel-keeping provisions of the Crimes Act 1961. This was accomplished by the proprietor hiring a masseuse whom he knew to be a prostitute and in the knowledge that a customer would be attacted to the premises by the prospect of sex, albeit at a further price. Apart from the fee for a massage the proprietor would not obtain any part of the price charged for the sexual "extras" and by turning his back on what was taking place he was placing himself, so the Government saw, it beyond the reach of the criminal law. It was this situation the Bill sought to remedy.

Afford has observed that the drug aspect referred to in the Bill's introduction was "over-stated." The police had feared the investment of parlour profits in the drug trade, whilst in the house and before the Statutes Revision Committee attention was directed to drug use by masseuses and to dealing within the parlours. Parlour drug dealing was, however, acknowledged by Justice Department officials to be almost non-existent.

Prostitution was clearly the principal concern of the Bill.

The reception accorded the proposed legislation

The Bill was not without its critics. The *New Zealand Herald* editorialised that Parliament and the police seemed "in danger of overreacting even to a ludicrous degree" and ventured that the existing law was adequate. The Council for Civil Liberties doubted whether prostitution and drug abuse was becoming particularly more prevalent in massage parlours and predicted, in submissions to the Statutes Revision Committee, that nothing would be gained by the legislation.

Prostitution would "continue regardless and no doubt continue in massage parlours" while drug abuse would not be controlled by "stopping up the odd leak". These and "other vices will continue unabated in one place or another but one more industry will be licenced and one more area of freedom restricted".

In the House of Representatives Dr A M Finlay described the Bill as "heavy handed and inept",[6] while Mr R Prebble saw it as "worse than window dressing" and suggested that every parlour then existing

would obtain a licence even though the evidence suggested to him that up to 75% of parlours were "fronts for brothels".[7]

The concern of the Government and the police had not been shared by the public at large. According to Afford the police estimated that they had received a maximum of 20 complaints concerning parlour activities. This lack of public concern was reflected by the small number of submissions made to the Select Committee considering the Bill. Thirteen submissions were received from the public: only two welcomed and supported the Bill.

The legislation

Section 5(1) makes it an offence to operate a massage parlour without a licence. The licensing jurisdiction is vested in the District Court. Eligibility for a licence is confined by s 6 to those (except in the case of limited liability companies) who have attained their majority and have not been convicted within the ten years preceding the application of an offence agasinst any of ss 146 to 149 of the Crimes Act 1961 (keeping place of resort for homosexual acts, brothel-keeping, living on earnings of prostitution, procuring sexual intercourse) or of an offence against s 46 of the Police Offences Act 1927 (soliciting) or of an offence against the Narcotics Act 1965 or the Misuse of Drugs Act 1975. Moreover, any person who has previously held a licence that has been cancelled within the previous five years is ineligible for a licence.

A company may not obtain a licence if any person who would be an officer of the company is ineligible to obtain a licence in his or her own right. Section 11 provides that no licence can be granted unless the District Court Judge hearing the application is satisfied that the personal character of the applicant is such that he or she is a "proper person" to carry on the business of operating a massage parlour. In the case of a company every officer of the company must be such a "proper person". The term "proper person" is nowhere defined in the Act.[8]

Every licensed parlour is required, in terms of s 17, to be under the effective supervision of the licensee or of a manager approved by the Court. Only a person who would be eligible to apply for and obtain a licence in his own right and who is a "proper person" to obtain such a licence can be approved.

Notice of an application for a licence must be served upon the police as must notice of an application for approval of a manager. The police are entitled to object in each case.

In the case of an application for a licence the police are expressly entitled to object, and or be heard, but in the case of an application for approval of a manager the police entitlement is expressed to be to "object to *or* be heard." (emphasis added) This rather strange situation seems to be the result of a legislative oversight. Section 17(3) enables the police to "object to or be heard" on an application for approval of a manager and applies in such a case the provisions of ss 7 to 9 (they deal in the case of licence applications with the contents of the application, service on the police and proof of service). Section 17(3) does not, however, apply to an application for approval the provisions of s 10(2) which in the case of licence applications enables the police if they have objected to appear and he heard.

The legislation deals in ss 18 and 19 with the employment of masseurs and masseuses by providing that no person shall be entitled to be employed in such a capacity in a massage parlour if he or she has not attained 18 years, or has in the preceding ten years been convicted of any of the offences set out earlier herein that would preclude a person from obtaining a licence. Moreover, a person may not be so employed if an order has been made by the Court within the preceding five years terminating his or her employment as a masseur or massuese. Every licensee is required to maintain a list showing the full name, address and date of birth of every massuer and masseuse employed and the police are empowered to inspect the list on demand. It had originally been intended that employees would be required to apply to the Court for a certificate of approval of employment. But this proposal was not proceeded with once it was appreciated how administratively cumbersome it would have been.

The Act, of course, contains disciplinary provisions. They are to be found in ss 25 to 32.

The Court may cancel or suspend a licence or impose a fine upon a licensee. Similarly the Court may cancel a certificate of approval of a manager. These powers can be exercised where it is proved, on a complaint, that a licensee, officer of a licensee company, or manager has:

- been convicted of any offence that would disentitle him or her to obtain a licence;
- been convicted of any offence against the Act more than once within three years;
- been convicted of any offence by virtue of which he or she is not a "proper person" to hold a licence or manage a parlour.

The same powers can be exercised upon proof, on complaint, that a masseur or masseuse has been convicted of an offence involving an act of prostitution, or has performed an act of prostitution, and the performance of the act was facilitated by the failure of the licensee or manager to effectively supervise the conduct of the business in the parlour.

In the case of a licensee company the Court is empowered, where the grounds of the proven complaint relate to any conduct or omission of an officer of the company, to order the termination by the company of the appointment of that officer. Failure to comply renders the company liable to fine and its licence liable to cancellation or suspension.

The position of masseurs and masseuses has not been forgotten. The police may apply to the Court for an order that the employment of a masseur of masseuse be terminated if he or she has, in the course of employment, performed an act of prostitution or has been convicted of an offence (other than an offence specified in s 6(2)(a) of the Act) and, by reason of that offence, is not a proper person to be employed as a masseur or masseuse.

The Act in operation

The licensing provisions of the Act came into force on 1 April 1979 and had their greatest impact in Auckland. That city currently has 32 licensed massage parlours whilst in Wellington there are 12 with a similar number in Christchurch and smaller numbers in other cities.

Very few applications for licences have been opposed.[9] The following table compiled from Auckland District Court files for the period 1979 to 1982 inclusive reveals the position in that city:

Year	Lodged	Police	Granted	Refused	Withdrawn	Struck out-no Appearance	Granted after police Opposition
1979	31	5	27	2	1	1	1
1980	13	1	11	0	2	0	0
1981	9	1	7	0	2	0	0
1982	11	0	9	0	2	0	-

Over the same period the police at Auckland unsuccessfully opposed the renewal of a licence while their opposition to renewal of a second resulted in the application for renewal being withdrawn. The police lodged complaints against three licensees which resulted in the surrender of one licence and the withdrawl of an application for renewal of a further, while in the third case the police application failed. Three complaints were made against employees and of these one succeeded.

In Wellington the Court records reveal that over the same period no application for a licence was refused. Although the police initially objected to two applications where approval of more than two managers in each case was sought. The police view was that any more than two managers reduced effective supervision to an unacceptable level. In one further case the police initially opposed an application where each of two proposed managers had a conviction recorded against him: one for possession of heroin, the other for obstruction under the Narcotics Act. The replacement of the proposed managers saw the objections withdrawn. Two complaints against employees were withdrawn by the Police while a third resulted in an order for termination of the masseuse's employment being made by the District Court, with the order, however, being set aside on appeal.

In the seven Auckland licence application cases opposed by the police the grounds of opposition varied from allegations against applicants of associating with criminals including "national criminals", employing drug users and known criminals, employing prostitutes, allowing acts of prostitution to take place on premises, to engaging in prostitution and cannabis use. In once case the applicant was the girl friend of a man "known to police as a drug dealer and in custody awaiting trial for murder".

The renewal applications were opposed as a result of the alleged peformance of acts of prostitution and their facilitation by the failure of the licensee to effectively supervise the premises. Similar grounds gave rise to the complaints against licensees while in one case a licensee surrendered his licence after the police complaint was based upon his conviction and fine of $120 on a charge of possessing "a small amount of cannabis".

The last case provides an interesting contrast with an application heard in Wellington in 1979 where a licence was granted to a man who had a history involving 166 convictions for false pretenses as well as a conviction for each of burglary, theft and forgery. The police did not object to the application and although the magistrate as a result of his "heresay knowledge" of the applicant felt concern at the issue of a licence he took the view that in the absence of an objection he had no alternative but to grant the licence.

With respect this view may well have overlooked the requirements of s 11(1) of the Act. That section provides that the District Court Judge "shall not grant the application unless he is satisfied that the personal character of the applicant is such that he is a proper person to carry on the business of operating a massage parlour". In the case in point there was no evidence produced to have enabled the magistrate to have been satisfied as to the personal character of the applicant other than the absence of a police objection to the application. It is very doubtful that the lack of such an objection could, on its own, satisfy s 11(1).

A failure to provide evidence of personal character is not unusual in applications for massage parlour licences. In Wellington no applicant for a licence in 1979 – the first year of the Act's operation – provided any evidence of character by way of references or otherwise while in Auckland 5 out of 31 applicants provided references (3 of the 31 applications went to hearing following police objections and evidence of character was given in those cases). In 1982 the position was no better in Auckland with only one of 11 applicants providing evidence of character. In Wellington the position improved that year with reference as to character provided by 3 of 5 applicants.

In dealing with this type of licence application the approach of the Courts has frequently been, in effect, to allow the police to determine through their inquiries whether the applicant was a "proper person". The absence of a police objection appears to have been conclusive of the matter. Such an approach is not in keeping with the requirements of the Act: the duty is placed upon the Court and not the police.

Effectiveness of legislation.

With the Act having been in force for five years it is possible to say that those who in 1978 predicted that prostitution would continue in parlours notwithstanding the legislation may have taken the more realistic view. The police certainly do not claim that the legislation has been effective in eliminating prostitution from parlours. Superintendent Ray Austin ventured on Television New Zealand's *Close Up* in June 1982 that while the police can control what occurs in the streets it is quite another matter to succed in controlling what takes place in houses and massage parlours. A former head of the Auckland Vice Squad, Detective Sergeant TV Brien, told the writer in 1983 that it would "realistically be naive to believe that prostitution was not taking place in massage parlours" and that while there are licensed parlours that do endeavour to run establishments free from prostitution nonetheless acts of prostitution take place "in a

substantial number of parlours".

This view is supported by a number of inquires undertaken by the news media. The 1982 *Close Up* programme concluded that prostitution was flourishing in massage parlours and, moreover, that it was openly evident and seemingly beyond the powers of the police to control. One masseuse confided to the television reporter that if most masseuses employed in the parlours were not prostitutes when they commenced employment, they were soon after. Another declared that prostitution was "what the parlours are all about" and "that's what we are in the parlours for".

This was given emphasis (on 24.11.82) by a *NZ Truth* report that a masseuse employed seven days per week in a massage parlour where "extras" were not available earned with over-time $172. Up to $1,000 per week could be earned in parlours that provided "extras". The dilemma of the police was that a vigorous approach to the parlours by the vice-squad — even if the manpower resources were available — would see the prostitution trade moving into the bath-houses, and rap parlours, where licences are not required.

Again in 1982, *NZ Truth* (24.11.82), after a survey, reported that in Auckland massage parlours "walk in sex" was "freely available". Massage parlours were described as "thinly disquised fronts for high class brothels" while "sex is only a door away from pedestrians in the city streets". The conclusion was that "only a handful" of the licensed parlours were not providing sex.

Legislative deficiencies

The following year the *Sunday News* (3.4.83) reported that "loopholes" in the legislation had "frustrated the police". There are a number of deficiencies in the legislation.

The first is of a fundamental nature and questions the efficacy of the legislation itself. Simply put, it is that the introduction of this licensing system has given rise to a new phenomenon in New Zealand: the rap parlour. In England the term "rap" is understood to mean "rent a prostitute" while in New Zealand it denotes, in theory, repartee. According to the promotional claim of one Auckland rap parlour conversation takes place with "nude ladies in exotic private suites" and "chelsea style parlour games" are available to customers.

The police are aware that prostitution is prevalent in many rap parlours. But rap parlours are not required to be licensed. A rap parlour is therefore an alternative available to those who would not qualify for a massage parlour licence. It has an additional advantage. Section 35 empowers the police to enter and inspect at any time any licensed massage parlour; no such power exists in respect of rap parlours. This prompted one Wellington massage parlour licence holder to surrender his licence and to write to the police advising that he was thereafter operating a rap parlour and that officers would require a warrant to enter the premises. This was stated to be the result of "unfair and unjust hasslement (sic). . . ."

Similarly the licensing of massage parlours have given impetus to so called photographic studios — which make available "nude ladies and camera equipment for artistic photography" — and to escort agencies. The police are aware that acts of prostitution are taking place in some of these establishments. The arguments advanced to justify the licensing of massage parlours would be equally as applicable to rap parlours as well as the other types of agency referred to. But any extension of licensing controls[10] to encompass these other areas could be expected to test the ingenuity of those in the trade and not licensed for only a short time before a new expedient was devised that circumvented the extended licensing controls. There would then have been enacted a classic example of the "controls beget controls" syndrome.

Regulating a commercial enterprise

The remaining deficiencies in the Act are of a mechanical nature but some of them illustrate the inherent difficulties involved in endeavouring to regulate commercial enterprises of this type. A discussion of them now follows.

Section 19 requires every licensee to maintain a list setting out the full name, address and date of birth of every person employed as a masseur or masseuse in the parlour. The police are entitled to inspect the list. Every licensee who makes a false entry on the list commits an offence. An employee who supplies false particulars to a licensee employer does not however commit an offence per se. The experience of the vice squad in Auckland suggests that in many instances the details are fictitious. False details are supplied by employees who would be prohibited by the statute from obtaining such employment or who don't want their names associated with a massage parlour. The police view is that there is no offence committed by the use of an alias. The licensee could be successfully prosecuted only if proof existed that he had knowledge of the false entry. The employee could be prosecuted only if he or she worked as a masseur or masseuse in breach of one of the prohibitions contained in the statute. The use of false particulars renders detection less likely.

A similar difficulty arises with s 18 which prohibits a person under 18 years of age from gaining employment as a masseur or masseuse. Such a person commits an offence punishable by a maximum fine of $200 by breaching the prohibiton but the supply of a false birth date to a licensee is not unusual. In such a case a licensee is liable to penal sanction if he employes a person under 18 only if he knows the person to be under age. The police find evidence of such knowledge particularly difficult to obtain.

It is no less difficult to establish knowledge on the part of a licensee of acts of prostitution taking place in the parlour. If an act of prostitution is facilitated by a failure to effectively supervise the conduct of the parlour business a ground for complaint exists in terms of s 30(1)(e) against the licensee. But with such acts occuring in massage rooms behind closed doors as an "extra" to an otherwise legitimate massage the police task in establishing that it was facilitated by a failure to effectively supervise the business is seldom easy.

Terminating employment

Even when an act of prostitution on the part of a masseur or masseuse can be proved the Act can be rendered impotent by that masseur or masseuse. Section 32(1) empowers the police to apply to the

Court "for an order that the *employment or engagement* of any masseur or masseuse by a licensee in the course of his business as an operator of a massage parlour *be terminated* . . ." where the performance of an act of prostitution in the course of employment by that licensee is alleged to have occured (the emphasis is added). However, the Court is only empowered to terminate employment or engagement then in existence and only employment by the licensee in whose premises the act of prostitution took place.

This is illustrated by *Police v Perkins* (Auckland District Court MA 504/81). The police applied for an order pursuant to s 32 (1)(a). An act of prostitution was proved. But Miss Perkins, of her own accord, left her employment with the parlour in question within a few days of the act of prostitution occurring. Blackwood, DCJ, after referring to the legislative intention, as expressed in s 18(1)(c), that a person against whom an order had been made under s 32 should be prevented from obtaining employment in a parlour for a period of five years, held that there was:

> a considerable lacuna in the legislation because. . . . I do not have jurisdiction to terminate the employment of a masseuse if in fact the employment at the date of hearing is no longer in existence. I cannot terminate a vacum.

His Honour predicted that:

> . . . every application under s 32 can be frustrated by the simple expedient of the defendant or respondent to the application ceasing her employment with the (parlour) even one day before the hearing, thus making the legislation completely useless and of no effect whatsoever.

The police were urged to take the matter up with the "appropriate legislative authority". The Act has not been amended.

This weakness in the legislation may to some extent have been ameliorated by recent District Court decisions[11] holding that masseuses employed in massage parlours have contravened the soliciting provision of the Summary Offences Act 1981 (s 26) by offering in a public place their bodies for the purpose of prostitution. A successful prosecution under s 26, however, is contingent upon a finding that a massage parlour is a public place. In *Stephens v Police* [1984] BCL 1042 Quilliam J held a parlour so to be. (Se also *SJM v Police* [1984] BCL 1311.) It is also, of course, dependent upon an offer being made to the prospective customer and not vice versa.

There is a further legislative oversight.

Section 6(2)(a) of the Act provides that a person convicted of an offence within the previous ten years against s 46 of the Police Offences Act 1927 (now replaced by s 26 of the Summary Offences Act), shall not be eligible to obtain a massage parlour licence. Similarly no person so convicted can obtain approval as a manager (s 17(4)) or work as a masseur or masseuse (s 18(1)(b)). No such prohibition, however, exists in the case of a person convicted of an offence against s 26 of the Summary Offences Act.

The repeal of the Police Offences Act by the Summary Offences Act was not accompanied by an amendment to s 6(2)(a) or s 18(1)(b) of the Massage Parlours Act although the Summary Offences Act did make an unrelated amendment to the Massage Parlours Act. However, the significance of this oversight may be attenuated in the case of licence applicants and prospective managers by the provisions of s 11 of the Massage Parlours Act (applied to prospective managers by s 17(4)(b)). A person convicted of an offence against s 26 of the Summary Offences Act may not be a "proper person" in terms of s 11 to carry on the business of operating or managing a massage parlour. Similarly a masseur or masseuse so convicted may not be a "proper person" to be employed in such a capacity. The same issue would arise on an application in terms of s 30 or s 31 for cancellation of licence or certificate of approval of a manager following upon conviction for an offence against s 26 of the Summary Offences Act.

Apart from the obvious defects in the statute itself — fundamental as well as mechanical — a limitation upon the police manpower resource is a further explanation for the failure of the statute to remedy the mischief aimed at. The vice squad at Auckland comprises only four officers while in Wellington three officers are attached to the squad (only two full-time). Apart from enforcing the provisions of the Massage Parlours Act the members of the vice squad are charged with enforcement duties relating to the Gaming and Lotteries Act 1977, the Indecent Publications Act 1963 as well as the provisions of the Crimes Act 1961 relating to sexual offences and the provisions of the Summary Offences Act concerning the same kind of offences.

Moreover as prostitution is not seen as involving a victim it is not given a high priority in police work and vice squad officers are not infrequently co-opted to inquiries with a higher priority.

Difficulties

It is manifest that Parliament in enacting the Massage Parlours Act substantially underestimated the difficulties that would be encountered in endeavouring through the simple expedient of a licensing system to eliminate from massage parlours an activity that is as old as man himself. Twenty-one years earlier in 1957 the English Committee on Homosexual Offences and Prostitution (the Wolfenden Committee (Cmnd 247)) were under so such illusion. On the issue of prostitution the Committee recorded their view that "no amount of legislation directed towards its abolition will abolish it".[12]

Perhaps before concluding in Parliament that licensing enabled the authorities to control, Mr McLay would have been advised to ponder the wisdom of John Milton who as long ago as 1643 observed in *The Doctrine and Discipline of Divorce:*

> If we think to regulate printing thereby to rectify manners, we must regulate all recreations and pastimes, all that is delightful to man . . . it will ask more than the work of twenty licensers to examine all the lutes, the violins, and the guitars in every house . . . and who shall silence all the airs and madrigals, that whisper softness in chambers. □

For footnotes see p 101

WORDS

Watch your weight

The list of phrases, with suggested alterations, that appeared in Peter Haig's short piece on p 10 of the January issue was marred by some typographical errors. We are reproducing it below with those eliminated and with a few phrases added that have been culled from more recent decisions.

was a contributory factor to	*contributed to*
rationalised its range by approximately 50%	*reduced its range by about half* (note also the dubious euphemism "rationalised")
exceeded its jurisdiction in an ultra vires manner	*acted ultra vires*
endeavour	*try (v) effort (n)*
predominantly	*mainly* **or** *chiefly*
these are appeals arising	*these appeals arise*
in the event of my being wrong	*if I am wrong*
notwithstanding that	*(al)though*
in the absence of the ability to exercise the power to order a sale	*if the power to order a sale cannot be exercised* **or even** *if a sale cannot be ordered*
he gave an explanation as to the reason why	*he explained why*
subsequent to the wife's death	*after the wife died*
make regulations regarding the establishment	*make regulations to establish*
commencement and termination	*beginning and end*
the necessity for balancing	*the need to balance*
during the course of her being at the premises, she . . .	*while at the premises, she . . .*
articles produced are small in number	*few articles are produced*
it was given in evidence by Mr H that	*Mr H said in evidence that*
effects of or in connection with the market	*effects on the market*
that under s 11(2)(b) there are contained	*that s 11(2)(b) contains*

Continued from p 100

1 418 NZPD 1689.
2 Hon D Thomson, Minister of Justice: 419 NZPD 1966.
3 "The Massage Parlours Act 1978 – a study of the New Zealand Legislative Process." LLM research paper VUW 1979.
4 416 NZPD 5061.
5 418 NZPD 1685.
6 418 NZPD 1183.
7 idem 1185.
8 The approach of the Courts to this term is illustrated by *Re An Application by Spence* 1 DCR 51; *Royal v Police* (Ak MA 462/79); *Donaldson v Police* (Ak MA 533/79).
9 It is not possible to determine the number of cases in which a prospective applicant has elected not to file an application after having learnt from inquiry of the police that an application would be opposed.
10 The law draftsman might not find it an easy task to define the type of "photographic studio" that would be covered by any extension of licensing control intended to control prostitution in such establishments.
11 *Police v Hansen* (Wn 13-7-83); *Police v Jones* (Wn 6-10-82); *Police v Stephens* (Wn 6-3-84).
12 para 225.

The risks of liberty

Now, the alarming aspect of the police practices I have been discussing, as I see it, is not so much that the police sometimes break the law in their zeal to enforce the law. There is nothing novel about this kind of police conduct. And, as everyone knows, there have been periods when police conduct was a great deal worse than it is today – when it was generally corrupt and brutal as well as technically unlawful.

No, the really alarming aspect of the current situation is that to a very large extent the American people have closed their eyes to this cutting of legal corners by the police or have actively prompted and promoted it. Panicked by the incidence of crime in big cities, they have become impatient with the restraints of the Fourth Amendment – impatient, too, with judicial insistence that the commands of the Amendment be obeyed by the police.

This popular indifference was mirrored in American newspapers. Arrests on suspicion, indiscriminate roundups, prolonged detention, interrogation designed to force confessions – all these were reported in the press with only occasional editorial protest. . . .

The maintenance of civil liberty depends upon a general understanding of what it means, and what it costs – upon a general acceptance of the risks that it entails.

The men who wrote the Constitution did not mean to make the policeman's lot a particularly happy one. They were well aware that the Fourth Amendment would, in some degree, reduce police efficiency and make law enforcement more difficult. But it was no part of their purpose to establish a police state. They were prepared to accept some measure of risk to public safety for the sake of protecting private rights. They did not, as Mr Justice Brandeis put it, exalt order at the cost of liberty.

Alan Barth
The Rights of Free Men (1984)

Property selling by solicitors

Statement by the Law Society Council (England)

Changes in professional practice are surely not ended particularly in the conveyancing field. In England there is a growing competitive element in legal practice. There is an illuminating article in the New Law Journal *of 7 December 1984 by John Loosemore on the topic of solicitors, conveyancing franchises and property selling. The Law Society in England has now issued a statement on property selling by solicitors. What it provides is not, of course, the present position in New Zealand. It is published however as a matter of considerable interest in its own right, and as perhaps a harbinger of things to come.*

Introduction

This guidance is based on the present legal and professional position relating to property selling by solicitors; except in two respects: an extension of the advertising guidance to permit greater freedom for the advertisement of property and a requirement, as a matter of good professional conduct, that when accepting instructions to negotiate the sale of a property a solicitor must enter into a written agreement as to remuneration, similar to that required for estate agents under the Estate Agents Act 1979.

The relevant principles to be observed by solicitors are expressed in the guidance now published and the position is elaborated in the questions and answers which follow the guidance. It is appreciated that there may be matters which are not covered by the guidance or the questions and answers and that further clarifications may be needed in due course.

As mentioned in the Press Release re-published in [1985] *Gazette,* January 9, p 2, the Council decided at their meeting on 20 December 1984 that the relevant Committees should report to the Council as to whether the public's and the profession's best interests would be served by seeking amendments to the existing legislation and rules and as to what legislation and/or rules would need to be amended if the Council were minded to relax the application to property selling of the present rules.

The Council will make a further announcement as soon as possible but it must be emphasised that the issues involved do raise important questions of principle affecting the future of the profession which must be most carefully considered. Meanwhile the profession is bound by the law and professional rules as they stand at present. The rules will be enforced.

Guidance for solicitors

1.1 Property selling is work which a solicitor may properly carry on in the course of his professional practice.

1.2 If this work is carried on by a solicitor who is in any way described or held out as such, he will be acting as a solicitor.

1.3 He will therefore be subject to the Solicitors Act 1974, the Solicitors' Practice Rules, the Solicitors' Accounts Rules and the Solicitors' Indemnity Rules and all other rules, regulations and principles of conduct affecting solicitors in practice.

2.1 A solicitor may sell property either as an activity of his existing practice or through a separate practice formed for that purpose and either on his own or together with other firms of solicitors. (But see para 5 below.)

2.2 The Solicitors Act 1974 and the Practice Rules prohibit solicitors from entering into partnership with or otherwise sharing their fees with non-solicitors. The Act also prevents solicitors from practising through a company.

2.3 Furthermore a solicitor cannot have arrangements with non-solicitors for the introduction to him of professional business; touting is also prohibited. The object is to ensure that the client is not improperly influenced in his choice of solicitor and to demonstrate that the solicitor is free to serve the client without outside influence.

3.0 A solicitor may describe himself only as a solicitor and by such other description approved by the Council. He may not describe himself as an estate agent but may advertise that he undertakes property selling work; he may describe the relevant part of his practice as an estate agency provided that such description is not misleading or inaccurate.

4.1 In property selling, a solicitor may employ staff experienced in other disciplines but not share fees or pay commission to any unadmitted employee except in accordance with the waiver for Staff Bonus Schemes granted by the Council on 28 July 1972 *(not reproduced here).*

4.2 An application for a waiver under the Solicitors' Practice Rules 1975 (relating to the management and supervision of offices) will be considered in the case of an office at which the only work carried out is the selling of property.

5.1 A solicitor must always place his client's interests before his own. Before accepting instructions to act in the sale or conveyancing of a property sold through an agency in which he has an interest; a solicitor must fully disclose that interest to the potential client. A similar disclosure must also be made when recommending such an agency.

5.2 A solicitor who negotiates the sale may, as may his partners (including those in associated firms), be faced with difficult questions of conflict of interests which may be insuperable. In accordance with the general principles of professional conduct, a solicitor must not act (or continue to act) if such conflict of interest arises or is likely to arise.

5.3 In particular, because of the likelihood of conflicting interests, the solicitor who or whose partners negotiate the sale, even if not acting for the vendor in the conveyancing, must not act also for the purchaser, either in the negotiations or in the

subsequent conveyancing. None of the exceptions mentioned in R 2, the Solicitors' Practice Rules 1936/72, can apply.

5.4 Further, even if the sale of the property was not negotiated by the solicitor acting for the vendor in the conveyancing, R 2 may well prevent any firm with whom that solicitor practises in partnership or association (including one with whom he practises property selling) from acting for the purchaser in the conveyancing of the property.

5.5 Quite apart from cases governed by R 2, difficult questions of conflict may arise where the solicitor or his partners act also for parties in related transactions.

6.1 Rule 1(2), the Solicitors' Practice Rules 1936/72 (as amended on 1 October 1984), permits a solicitor to advertise his practice in accordance with guidance published from time to time by the Council. The style and content of the advertising of properties for sale must comply with that guidance but so long as the advertisement is of the properties and not of the solicitor's practice it may be published by whatever means the solicitor considers appropriate.

6.2 Firms of solicitors may join together to display particulars and advertisements of properties which they are offering for sale through their individual practices. This might, for example, be done at a property display centre where a party interested in a property is referred to the individual practice dealing with the sale of that property.

7.0 When accepting instructions to negotiate the sale of a property, a solicitor must enter into a written agreement with the client. This must make provision for the remuneration to be paid for the work, the circumstances in which it is to become payable, the liability for any disbursements incurred in the course of the work, the circumstances in which the disbursements may be incurred and a statement as to the incidence of Value Added Tax.

8.1 The structural survey and valuation of property is not work which a solicitor may properly carry out as part of his practice, except as required to give advice on the price at which the property is to be offered for sale and to prepare sale particulars.

8.2 It should be noted that the Master Policy only covers claims incurred in connection with a solicitor's practice.

9.0 A solicitor who wishes to engage in property selling otherwise than as part of his practice would have to do so without himself or the property selling agency in any way being held out or described as solicitor or solicitors. If he also practises as a solicitor, he will be at risk of being in breach of R 1, the Solicitors' Practice Rules 1936/72; he would be precluded from either directly or indirectly inviting instructions through the agency or from having any arrangement with the agency for the introduction of professional business to his practice. In effect the solicitor would be unable to accept new clients referred to him by the agency.

Question and answers

Q1 Is property selling in effect to be regarded in the same light as say, conveyancing or probate work?
A Yes. If a solicitor undertakes to sell a property for a vendor, the vendor will be his client; the solicitor's relationship with him and the work he does for him will be subject to the law and professional rules now binding on solicitors in relation to their other work.

Q2 Will solicitors be able to conduct their property selling practice in the same office that they use for the rest of their practice?
A Yes.

Q3 Is there any objection to solicitors opening a branch office with, for example, a street level window purely for the purpose of their property selling business?
A No.

Supervision Rules

Q4 Does this office have to comply with the rules relating to the management and supervision of solicitors offices (Solicitors' Practice Rules 1975)?
A Yes, because it will indeed be a branch of a solicitor's practice and must therefore be staffed and supervised in accordance with the rules, unless a waiver is granted. (See guidance 4.2.)

Advertising

Q5 Can a solicitor's office with a street level window be used for the display of particulars of property for sale in the same way as estate agents do it now?
A Yes, but he must comply with the advertising guidance published in [1984] *Gazette* 1 August 2194, (which came into effect on 1 October 1984), as extended by Guidance 6.1.

Q6 Can a solicitor put "For Sale" notices on a property he is selling and send particulars to prospective purchasers?
A Yes, but see answer to the previous question.

Description

Q7 Can a solicitor undertaking property selling describe himself as "Solicitor and Estate Agent"?
A No. "Solicitor" covers everything which a solicitor does as part of his practice.

Q8 How can solicitors' offices be described in connection with property selling?
A The Solicitors' Practice Rules 1967, prohibit the use on nameplates and stationery of the name of any person other than a solicitor holding a current practising certificate. However, subject to the requirement of the advertisement guidance of 1 August 1984 that advertising must not be inaccurate or misleading, a solicitor may describe his practice, possibly a branch office where he conducts mainly or only property selling, as his or his firm's "property selling department", "property centre", "estate agency" or other suitable description.

Q9 In his advertising can a solicitor include a reference to that fact that he is a member of any particular organisation or association of solicitors?
A Yes, but in accordance with the advertising guidance (see answer to Question 5) the name must not be misleading in any way, nor should it be used in a misleading manner. Furthermore, as the advertising now permitted by R 1 as amended is the advertising of a solicitor's practice, any advertising under such a name must make it clear that the advertising is by named solicitors.

Q10 Can solicitors in the town of Craxenford use the name "The Craxenford Solicitors Property Centre"?

A This name may well be misleading unless at least a substantial number of solicitors in Craxenford are involved in the centre.

Estate Agents Act

Q11 Does the Estate Agents Act 1979 apply to solicitors?
A Section 1(2)(a) exempts from the Act "things done in the course of his profession by a practising solicitor or a person employed by him".

Remuneration

Q12 What is the purpose of the agreement as mentioned in Guidance 7?
A To enable the client to be entirely clear as to his liability for costs and disbursements.

Q13 Will commission charged on property sales be subject to The Law Society's remuneration certificate procedure and to taxation by the Court?
A If the agreement is signed by the client and accords with s 57, Solicitors Act 1974, The Law Society's remunerations certificate procedure becomes inappropriate. However s 57(5) provides that if on any taxation the agreement is objected to by the client as unfair or unreasonable, the taxing officer may enquire into the facts and certify them to the Court which may, if it thinks fit, order the agreement to be set aside or the amount payable under it to be reduced.

Q14 What matters should be covered in the written agreement relating to property selling?
A Including the requirements specified in Guidance 7, provision should be made for the following:

- the amount of the solicitor's remuneration and/or the method of its calculation;
- the circumstances in which the remuneration is to become payable;
- the amount of any disbursements (eg advertising) to be charged spearately and the circumstances in which they may be incurred;
- the incidence of Value Added Tax if to be charged additionally;
- whether the solicitor is to be the sole agent;
- the consequences of a client who instructs a solicitor as sole agent subsequently instructing other agents;
- the identity of the property, the interest to be sold and the price to be sought;
- the duration of the agreement;
- the signature of the client.

Q15 Although the scales laid down in the 1882 Solicitors' Remuneration Order have now been superceded, does The Law Society make any recommendation about property selling commissions?
A No; it is a matter for agreement between the solicitor and his client subject to what is said in reply to Question 13 above.

Q16 What is the position with regard to commission paid to a solicitor by an insurance company, for example where the solicitor's client takes out an endowment policy as security for a loan?
A Such commission is quite distinct from the remuneration paid by the client to the solicitor in relation to the property transaction. It should be remembered that a solicitor is obliged to disclose such a commission to his client and indeed to account to the client for it unless the client agrees otherwise.

Q17 Is there any objection to a solicitor quoting a composite fee for property selling and conveyancing?
A No, but he should be prepared to quote separate fees if so required.

Q18 Can the solicitor pay his property selling negotiators on a commission basis?
A No (R 3 Solicitors' Practice Rules 1936:72). He may only pay them a salary and a bonus in accordance with the Staff Bonus Scheme waiver mentioned above.

Insurance

Q19 Will a solicitor who undertakes property selling work be covered by the Master Policy?
A Yes. The position will be just the same as for any other part of his practice, as is his liability in negligence and contract. (See also Guidance 8.2 above.)

Q20 Will the solicitor's earnings from property selling work have to be included in his gross fees returns?
A Yes.

Q21 What is the duty of a solicitor who is asked to sell property of a value or character not usually handled by him or by the property centre in which he is a partner?
A As in the case of any work he does not feel he can properly handle, he must decline instructions and advise the client to consult another property seller, possibly a specialist agent. Furthermore, the solicitor should be aware that he could be negligent should he not take this course in appropriate circumstances.

Surveys and Valuations

Q22 Guidance 8.1 says that structural survey and valuation of property is not work which a solicitor may properly carry out as part of his practice. Is this the case even if the solicitor has a qualified surveyor or valuer on his staff and he undertakes the work?
A Yes, the positition is the same because the solicitor would remain the principal.

Partnerships & arrangements

Q23 Can a solicitor as a solicitor undertake property selling business in conjunction with someone else?
A He may only do so with another solicitor or firm of solicitors. Because solicitors cannot practise through companies (they are precluded by the Solicitors Act 1974), he may need to form a new partnership with the other solicitors for the purpose of property selling. As such, the new partnership if formed will be a new practice for all purposes including the Master Policy and the Accounts Rules. But see Guidance 6.2, as to joint advertising.

Q24 Is there any objection to a solicitor handling the sale where a non-solicitor is also acting?
A No, provided the solicitor does not share his fees with the non-solicitor and they are acting independently of one another.

Q25 Is it still a breach of the rules for a solicitor to agree to be on an estate agent's panel on a composite fee basis?
A Yes.

Q26 If a client instructs a solicitor to undertake the sale of his property, is there any objection if the solicitor accepts instructions for the conveyancing as well?
A No.

Continued on p 105

The legal profession in the marketplace

By Campbell McLachlan

In a series of developments which have all happened so fast that it is astonishing they have not happened years ago, the legal profession is coming out into the marketplace. New Zealand lawyers have lost the scale fee for conveyancing and face the imminent prospect of advertising. Yet the New Zealand profession is not alone. Challenges to the traditional mores are being experienced around the Commonwealth and particularly within that bastion of tradition, the Law Society of England and Wales. Campbell McLachlan, a New Zealand lawyer, is the London-based editor of **The Commonwealth Lawyer,** *journal of the new Commonwealth Lawyers' Association. He reports on the mood of change.*

The legal profession in New Zealand saw out 1984 amidst general public acclaim, at least from Government and consumer circles, for its removal of the scale fee for conveyancing, announced by means of pamphlets and television advertising in November, and for its proposals to introduce advertising this year. Elsewhere in the Commonwealth the same changes are either already in place or contemplated. In England and Wales the challenge to the profession goes rather deeper as the Government imposes plans to remove the monopoly on conveyancing.

It is the purpose of this note to review the background to these developments; to examine recent events in the United Kingdom and some of the possible downstream effects. Finally some discussion of the central issues raised for the profession in the debate over advertising and conveyancing will be attempted.

Market forces

"There are rules of conduct which all professional men must observe," said Lord Goddard CJ in *Hughes v Architects Registration Council* [1957] 2 QB 550, 559. "Refraining from advertising would, I think, clearly be one."

Up until the 1970's it was almost unquestioningly accepted both by lawyers and by society at large that the legal profession's duty to act in the public interest was best to be achieved by self-regulation and the imposition of restrictive and ethical rules which isolated the profession from market forces. It is therefore unsurprising that the initial moves for change came from those responsible for the application of market forces, the Monopolies Commissions and Offices of Fair Trading.

In the United Kingdom, following a major general report on the professions published in 1970,[1] the Monopolies and Mergers Commission delivered five reports concerning the legal profession, dealing with advertising restrictions and the "two counsel" rule. The Commission recommended that advertising restrictions should be removed. Its recommendation was substantially ignored, though it was reiterated by a special Royal Commission on Legal Services, which reported in 1979.[2]

Meanwhile, in 1973, the Lord Chancellor abolished the *ad valorem* scale charges for conveyancing, replacing the scale with a "fair and reasonable" standard. This was as a result of increasing dissatisfaction amongst both the public and the profession with the scale fee system and reports by the National Board for Prices and Incomes which concluded that the scale fee system was both expensive and inequitable. The 1979 Royal Commission recommended but only by a majority, that the solicitors' monopoly on conveyancing should be retained.

The second critical move in the exposure of the profession to market forces also came from the "outside", this time from the American Courts. In the landmark decision of *Bates v State Bar of Arizona* 433 US 350 (1977), the United States Supreme Court legalised lawyer advertising on the basis of the First Amendment to the Constitution (protecting free speech). The judgment is a compelling one because it examines, and rejects, all of the traditional arguments for the prohibition on advertising. It was argued that the hustle of the marketplace would adversely affect the profession's service orientation, and irreparably damage the delicate balance between the lawyer's need to earn and his obligation selflessly to serve. The Court failed to find any necessary link between the restriction on advertising and true professionalism. It found that to prohibit price advertising was simply to obscure a fact of which all lawyers and clients are aware; that legal services cost money.

Just two years earlier, in *Goldfarb v Virginia State Bar* 421 US 773 (1975), the same Court had ruled that the imposition of mandatory minimum fee schedules by Bar Associations was contrary to the Sherman Act (the major piece of United States anti-monopoly legislation).

These American decisions suggested that the tide was turning on the profession, and many Canadian and Australian jurisdictions began to look to advertising, and to the wider issue

Continued from p 104

Property selling not as "Solicitor"

Q27 Is it possible for a solicitor who holds a current practising certificate to sell property otherwise than in the course of his practice?

A Yes, if he or an agency through which he sells property is not described or held out as a solicitor. In such a case the Estate Agents Act 1979 would apply to him and if work were, by the selling of property attracted to any professional practice that he undertook, he would be at risk of being in breach of R 1. (See guidance 9.) □

of the legal profession vis-a-vis the public interest.

It is significant that the Law Society of British Columbia, which won a major vindication of its right to control advertising in the decision of the Supreme Court in *Jabour* (a case whose implications will be considered later in this note) is itself now embracing advertising. The Society reasons:[3]

> Lawyer advertising, including fee advertising, is here to stay. The movement is so well entrenched in North America, and growing, that to bar or further inhibit such advertising would be to disregard totally the social and commercial realities of our times.

Closer to home, the Victorian Law Institute Council lifted the ban on solicitors' advertising on 1 May 1984. The Law Society of Western Australia has moved to adopt new rules which even contemplate television advertising. The Law Reform Commission of New South Wales is conducting a mamoth Legal Profession Inquiry. Advertising in New South Wales is making hesitant beginnings despite the vacillations of the Law Society there.

Meanwhile at an international level too, the legal profession is under the competitions policy microscope. The Organisation for Economic Co-operation and Development (OECD), of which New Zealand is a member, has received a report on Competition Policy and the Professions.[4] The report considers the professions of law, along with medicine and architecture, and recommends that existing provisions should be re-examined to ensure that the professions get no larger exemption from competition law than is essential for the public interest. It recommends that member countries consider, inter alia,

(b) The extent to which present policies fully consider all relevant interests, including consumers, potential entrants to the professions, and alternative providers of professional services; . . .

(d) The appropriate extent to which the professions should be allowed to regulate themselves, consistent with public policy, and the advantages of providing limited as opposed to broad grants of authority to chambers or professional associations.

Specifically the report recommends removing fee scales and restrictions on advertising.

English situtation

How, then, have these emerging market forces fared in the birth-place of the profession? While the work of the Monopolies Commission and the Royal Commission on Legal Services might have provided a climate for change, it cannot be said that anything really happened until the maverick Labour MP, Austin Mitchell tabled his private member's House Buyers Bill in the House of Commons in June 1983.

The basic purpose of the Bill was to ensure cheaper, faster conveyancing for house buyers by widening the class of conveyancers. Despite its introduction by a Labour back-bencher, the Bill not only reached a second reading in December 1983, but also commanded the support of a majority of the House (96 for and 76 against). As Lionel Barber commented on 11 November 1984 in *The Sunday Times*:

> This was the most visible demonstration of a groundswell of public opinion, right across the board, that the professional services on offer were not what consumers wanted or needed. Heavy handed lobbying by the Law Society backfired and Ministers suddenly found the courage to act.

The House Buyers Bill was withdrawn following a Parliamentary question from Mr Austin Mitchell, who asked what plans the Government had for improving the house transfer system in England and Wales. The Attorney-General, Sir Micheal Havers, replied by announcing the establishment of a committee, chaired by Professor Farrand, to look at ways of introducing greater competition into conveyancing and thereby promoting a quicker and cheaper house transfer system. The Farrand Committee was to report by the end of 1984 on the establishment of a new corps of licensed non solicitor conveyancers and the tests and requirements to be imposed on them. Legislation was promised for the 1984/5 session. Sure enough the Farrand Committee reported in September 1984,[5] and the Administration of Justice Bill was introduced by the Lord Chancellor into the House of Lords in December 1984.

However that creation of the licensed conveyancer is by no means the end of the matter. There is also a second prong to the assault on the conveyancing monopoly, which contemplates allowing banks, building societies and other major institutions to offer conveyancing services to their clients by employing their own solicitors. The Government does not plan any legislation on this subject until the 1985/6 session, and it is to be preceded by a consultation paper.

The Law Society response

These developments awoke the legal profession and the Law Society rather sharply to the range and extent of the challenges massed against them. One of the first responses was a change in the traditional view on advertising. While the profession as a whole had a comfortable assurance of work from conveyancing, it was relatively easy to ignore dissentient voices from within arguing that the advertising ban was unfair and unnecessary. With the prospect of competition, to deny the profession the right to advertise would be to deny it the right to compete on equal terms.

So, from November 1983, the Council of the Law Society began to move towards the introduction of advertising. The official change came on 1 October 1984 and extended a carte blanche to advertise in the press, on radio, on the solicitors' premises and in directories.[6] Advertisements could include fees and categories of work. The main restrictions were a "good taste" requirement, a prohibition on inaccurate or misleading statements and on statements extolling the virtues of one firm over others.

The response of the profession has been restrained as yet though marked with the humour which is the hallmark of British advertising. One firm has been advertising on radio with an American Deep South blues jingle about a man who is

sacked, gets drunk, is arrested by the police and is thrown out of his house by his wife but is saved by the services of his local solicitor. Another has used newspaper advertisements depicting Little Red Riding Hood in bed with the Big Bad Wolf above the slogan: "Don't you wish you'd used a Solicitor?"

It is not possible to attempt to gauge as yet the effect of lawyer advertising on the market. It ought to make it easier for young solicitors to obtain clients. It ought to make it easier for clients to locate and decide on a solicitor. One thing is clear, the profession is at least slightly better armed to meet possible competition.

Competition

Where is this competition going to come from? The first group will be the new corps of licensed conveyancers.

The Farrand Committee's proposal is to create a new professional body, whose members will be trained and empowered only to carry out domestic conveyancing. The Committee was motivated by the need for consumer protection:[7]

> The risks to the consumer are too great to permit market forces alone to control entrance to and continuation in the conveyancing market. Our approach in considering the safeguards needed for non-solicitors to undertake conveyancing has thus been to propose certain essential restrictions on competition, although these are intended to go no wider than is necessary to ensure adequate consumer protection.

The salutary point is that the Committee found that "going no wider" meant going as far as creating a mini Law Society complete with stringent educational requirements for admission and ethical restrictions on practice. The Committee recommended the formation of a Council for Licensed Conveyancers with supervisory and disciplinary functions. It went into some detail to specify the content of the written tests to be sat by candidates for the profession. These were formulated on the assumption that licensed conveyancers would be as fully qualified as solicitors, but in the one narrow field of conveyancing.

In the result, the Administration of Justice Bill as introduced is a disappointing document. It is disappointing because it delegates to the Council most of the important decisions to be made about the shape of the new profession. Clause 9 empowers the Council to make training rules. Clause 16 empowers the Council to make ethical rules. Clause 28 allows the Council to make rules prescribing the circumstances in which licensed conveyancers may form companies or be employed by "recognised bodies"[8] to provide conveyancing services. The provisions of cl 28 are very widely drawn and it remains unclear whether such recognised bodies would be required to operate with unlimited liability or could be prevented from being effectively financed and controlled by large financial institutions.

If the Bill as it stands gives the banks and building societies a back door entreé to conveyancing, there is every sign that they will shortly be welcomed in the front door. The Government has published its promised Consultation Paper *Conveyancing by Employed Solicitors* which contemplates conveyancing by the large financial institutions. The Law Society has responded with a strong case based on the interests of the consumer and the danger of conflict of interest. It argued that institutional conveyancing would result in a reduction of consumer choice and in the loss of independent advice on the conveyancing transaction and related financial arrangements:[9]

> It is . . . blindingly obvious that there is only one effective safeguard to the conflict of interest, namely the accessibility of impartial, independent advice from legal advisers whose sole duty is to represent client's interests.

Faced with the prospect of the loss of their assured source of income, solicitors in England and Wales are coming up with a variety of schemes to get back to the "sharp end" in property transactions.

The first type of scheme is simply property selling by solicitors. The Council of the Law Society has taken the view that, although property selling has not been widely undertaken by solicitors in the past, it is work which may be so undertaken.[10] In an extraordinary move, it has published a set of guidelines [reprinted at [1985] NZLJ 102] sanctioning property selling not only by existing solicitors' practices, but also by separate practices formed especially for that purpose. Obviously such firms must continue to operate within the ethical constraints imposed on solicitors, especially with regard to conflict of interest. However the guidelines do give the green light to the National Association of Solicitors Property Centres which has been urging the development of what are essentially solicitor-run estate agencies.

The second type of scheme is the conveyancing franchise. This would operate by the franchiser, a limited company, selling a computerised conveyancing package to selected firms who would come under the umbrella of the franchise, and gain the benefits of its nationwide promotions. One of the most prominent proposals for this type of scheme comes from a group of about 50 solicitors in Liverpool under the name of "Conveyancing Exchange Limited". The scheme has been described by one of its promoters as "Kentucky Fried Conveyancing". It still awaits the approval of the Law Society's Contingency Planning Working Party.

The New Zealand situation

How, then, is the profession in New Zealand to read these auguries?

First, it is abundantly clear that society's view of how the legal profession ought to be acting in the public interest are changing rapidly, or perhaps making themselves felt as never before. On the advertising issue, the profession's interest in preserving its dignity from the odium of advertisement could not stand against the public's need to be informed. The old system of word of mouth was simply not enough, especially for the "first-time user". Further, the debate on the conveyancing issue has shown evidence of widespread public discontent with the services currently on offer. It is hard to justify denying the public a cheaper faster conveyancing package should one with sufficient public protection be on offer.

However there are other, and perhaps more important, values at stake. In fact the heart of the matter

is the value of a free and independent legal profession and the service which only it can offer, namely free and independent legal advice. The proposals of the Farrand Committee for licensed conveyancers in many ways only enhance and support the educational pre-requisites, ethical restrictions, and financial requirements imposed on the givers of legal advice.

However one of the difficulties with the debate in England has been that the profession is all too plainly struggling to maintain its own bread and butter. Nobody is fooled about what the conveyancing monopoly has meant for the financial security of solicitors.

Many of the related developments could also be seen in the same light. The power to advertise, which will more than anything else affect the public image of the profession, could just as easily promote an image of a profession more self-interested than ever. The encouragement of property selling may be still more dangerous if it leads the profession into open conflict with estate agents.

For all that, the potential dangers to the public of a weakened legal profession are considerable. If banks and building societies gain the power to control not only loan finance but also the actual house conveyancing transaction, then average house buyers will miss out on the chance of independent advice. They will have no option but to accept the institutional package. In a more general way, too, the public will miss out. If more and more legal firms are forced into conveyancing franchise or property centres, the range of real choice of legal service will diminish. The strength of the profession, which has lain in the provision of the whole range of legal services, will be emasculated.

Accountability

One final issue has emerged, too, from these recent experiences. It is the issue of the power and accountability of a law society.

In the landmark Canadian decision of *Attorney-General of Canada and Jabour v Law Society of British Columbia* (1982) 137 OLR (3d) 1 (SCC) the Supreme Court of Canada decided that the Law Society had autonomous decision making power over the issue of advertising. John Wilson and Christopher Wydrznski have argued that the decision was wrong both in law and in principle.[11] Their conclusion is instructive:

> In the wide sense, the central issue in *Jabour* is the nature of the independent legal profession. While an independent Bar is undoubtedly a hallmark of a democratic society, the core question is whether it is ultimately in the public interest to equate the independence of the self-governing legal profession with freedom from all forms of regulation. The response of the Law Society of Upper Canada to the Professional Organisations Committee of Ontario 1979 is indicative of this current dilemma: "To speak of the Law Society making 'public policy' is a misconception of its role and function. The Law Society policy is directed towards regulation of the profession. It is not public policy which is enunciated, but Law Society policy. It is recognised that Law Society policy affects the public and the Society is very sensitive to the impact of these policies on the public, but because the public is affected by them does not convert the policies into public policies. Public policies are only enunciated by public bodies."
> It is, perhaps, now necessary to recognise directly that access to justice and the delivery of legal services involve questions of "public policy" and that public agencies have a mandate and distinct requirement to evaluate the effects of professional policies by explicit recognition of the public interest. Self-governance in itself may suggest that such scrutiny occur through the auspices of some independent agency.

What has been all too apparent from the English experience is that the Law Society has ignored the writing on the wall in the shape of the reports of the Monopolies Commission and the Royal Commission on Legal Services. Now, when the chips are down, it is being forced into all sorts of hasty decisions which may or may not be in the best interest of the public or the profession, and which at any rate are likely to be misinterpreted by the public as simply in the profession's limited self-interest.

John Loosemore, an English solicitor, has put the case for the Law Society as a leader in new developments, rather than fighting a rear guard action to preserve the old view of the profession.[12] He suggests that, rather than allowing the development of new collectives such as conveyancing franchises or property centres, the Law Society ought to foster the continued strength of individual firms by supplying computerised conveyancing services to the whole profession.

Conclusion

The major premise behind these suggestions is the idea that the Law Society should be responsive to the needs not only of its existing members but also to the wider needs of society. In so far as the New Zealand Law Society has already taken the lead it is to be congratulated. But the challenge is there for the future to ensure the continuing relevance and independence of the legal profession. □

---

1 Monopolies Commission *A Report on the General Effect on the Public Interest of Certain Restrictive Practices so far as they prevail in the supply of Professional Services* (Cmnd 4463, 1970).
2 The Report of the Royal Commission on Legal Services (Cmnd 7648, 1979).
3 (1984) 11 no 10 *National* 26.
4 Organisation for Economic Co-operation and Development *Committee of Experts on Restrictive Business Practices Report on Competition Policy and the Professions* (Paris, 1984). New Zealand did not reply to the questionnaire sent to member countries for the compilation of this report.
5 *The First Report of the Conveyancing Committee: Non-Solicitor Conveyancers — Competence and Consumer Protection* (London, HMSO, 1984).
6 See the Council Statement "Advertising by Solicitors" in *The Law Society's Gazette* of 1 August 1984.
7 Ibid. note 8 para 1.35 p 9.
8 Defined in cl 28(2) and further regulated in the Fifth Schedule.
9 "Conveyancing by Employed Solicitors" (1984) 81 no 2 *Law Society's Guardian Gazette* 1485.
10 "Property Selling by Solicitors" (1985) 89 no 1 *Law Society's Gazette* 2.
11 "Competition in the Market for Legal Services after *Jabour*" (1984) 22 No 1 *University of Western Ontario Law Review* 95.
12 "Solicitors, Conveyancing Franchises and Property Selling" (1984) 134 *New Law Journal* 1081.