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The All England Law Reports

On 19 June, 1986 a reception was held on the North Lawn, Lincoln's Inn, for members of the Judiciary and the profession to mark the Golden Jubilee of the All England Law Reports. *These Reports are edited by Peter Hutchesson LLM, who proudly continues to describe himself on the title page as a New Zealand Barrister. At the reception an address was given by Lord Goff of Chieveley, one of the new Law Lords, and this is published herewith in place of the usual editorial.*

My Lords, Ladies and Gentlemen.

We have gathered here today to celebrate the Golden Jubilee of a remarkable enterprise – the *All England Law Reports.*

Our hosts, Messrs Butterworths, rightly regard the *All England Law Reports* as one of the brightest jewels in their star-studded crown. How justified is their pride! Blackburn would have admired the quality of the reporting: Baskerville would have approved the typeface: and Bentham would have considered the whole project as conforming to the principle of utility. What higher praise can there be than that!

Indeed, clustering round me as I speak – unseen by you, but I know that they are there – are standing the shades of the law reporters of the past – Lord Coke, whose style was described by Wallace as "everything but agreeable": Plowden, perhaps the greatest of them all: Lord Mansfield's reporter, Sir James Burrow, known as the father of the headnote: Lord Campbell, who kept a drawer marked "bad law", to which he consigned (unreported) those cases which he considered to have been "improperly ruled": Beavan, from whom, even after the Council of Law Reporting was established, Lord Romilly refused to withdraw the exclusive right to copies of his Judgments: Barnardiston, ranked by Professor Winfield at the bottom of his list of incompetents: Espinasse, poor Espinasse, of whom the least said the better: the unknown compilers of no less than 250 years of Year Books: even the man whom Lord Coke described as the earliest law reporter of them all, Moses himself – the shadows of all these, and many more, have returned to Lincoln's Inn tonight to pay their silent tribute to this great enterprise.

How aptly are they named the *All England Law Reports!* They have crossed the Thames and the Tamar and the Tees, to penetrate to the uttermost corners of England: they have even, like Edward the First, crossed the Severn and conquered the Principality of Wales – indeed, I have imagined that it was for the purpose of including Wales that they were called the *All* England Law Reports. Whether they have dared to cross the Tweed, I do not know; but if they have, no doubt that that redoubtable Scot, Professor Sir Thomas Smith QC of Edinburgh University, would not have tolerated their presence in Scotland for one minute; but would have hunted them down, confiscated and condemned them to be publicly burned at the Mercat Cross. Certainly they have, unlike the British Government, remained in occupation of India – sharing the spoils with their first cousin, the *All India Reporter;* and there is ample evidence that they have been used throughout the Commonwealth.

Let me give some examples. It is recorded, for example, that volumes of the *All England* have been hurled by distraught householders at marauding tigers in Tasmania; other volumes have been used as improvised pillows by exhausted gold diggers in the Yukon; during a serious grass shortage in Fiji, others were shredded to make grass skirts; yet others have provided light reading for beleaguered explorers during the long dark nights of the Antarctic winter; and, most poignant of all, one volume was tragically eaten by desperate mariners, shipwrecked off the Cocos Islands, only, of course, after first eating the cabin boy. These well-documented cases provide perhaps some indication that the project has exceeded the wildest dreams of its progenitors.

Even our hosts are driven to recognise, though they never speak of it, that there is a rival organisation, which has the impudence to describe its products as the official *Law Reports.* But how else do we distinguish them? The official Reports are, of course, disfigured by the presence of arguments; they are a distinctly argumentative publication. They tend to be more expensively bound; and they don't squeeze *quite* so many words onto the page. But these are trifles in the world of law reporting. More important, I am privileged to say this: Carol Ellis, Queen's Counsel, the distinguished editor of the *Law Reports,* has particularly charged me tonight to express, on behalf of herself and of all those who labour with her, their warmest congratulations to their friendly rivals.

It is the fate of all successful enterprises to become institutions – the Church of England, the Inns of Court, even the House of Lords itself, bear eloquent testimony to this universal truth. But the *All England* is not just an institution. It is a living institution still palpitating with life. And I can see no reason why, 50 years hence, perhaps here in the garden of the most beautiful of our Inns, the youngest of us here today, with the down now soft upon their cheeks, may not find themselves, by then venerable greybeards and venerated masters in the law, summoned again by our generous hosts to celebrate not just a Golden Jubilee, but the centenary – I mean, of course, the first centenary – of the *All England Law Reports.* Long may they continue to flourish; long may they continue to maintain the high standards which we have always associated with them; and how I wish I had shares in them!

My Lords, Ladies, and Gentlemen – I ask you to raise your glasses and drink with me the health of the *All England Law Reports.* □

District Court Rules: Pre-trial procedures

The Secretary of the District Court Rules Committee has advised that a Working Paper has been prepared on the topic of pre-trial procedures. Copies of the Working Paper are available from:

The Secretary
District Court Rules Committee
C/- Department of Justice
Head Office
Law Reform Division
Private Bag
Postal Centre
WELLINGTON

The Working Paper proposes changes based on two principles:

(a) all interlocutory procedures should be carried out within fixed but realistic times, subject to the right of any party to apply for a timetable tailored to meet the special requirements of a particular case;
(b) effective sanctions should be provided for failure to comply with the time limits set; the defaulting party should lose further rights of access to the Courts, but with a power for the Courts to reinstate proceedings or set aside Judgments where the interests of justice so require.

The Working Paper sets out a number of specific suggestions to give effect to these two general principles. The District Court Rules Committee wants the recommendations to be considered and commented on as extensively as possible. Practitioners with an interest and experience in the working of the District Courts are invited to obtain a copy of the Working Paper and to forward their views on it as soon as possible. The final date for submissions is 30 September 1986. □

Legalese at school

Judge Maxwell recently had occasion to address a group of 7th Form students at Otahuhu. He spoke on the "Interpretation of Statutes and the Construction of Legal Documents" and in the course of his talk, gave his own suggestions for answering a difficult question in the English paper in a recent Bursary examination. His Honour received a letter of thanks from the class which would indicate that his emphasis no doubt on the need for clarity and certainty had met with an understanding response, and a willingness to show that this particular English class also knew the meaning of the word satire. The letter read as follows:

Dear Judge Maxwell,

For and on behalf of all or part of Otahuhu College's Seventh Form English class members, attendants, listeners and/or participants, I hereby give and convey to you, the aforesaid, all and singular, our deep and sincere, heartfelt respect, thanks, praise and admiration with reference to the discussion, talk, conversation, consultation and/or speech which occurred on or about Friday, the twenty-seventh of June of this year.

Together with and in addition to the said class members, attendants, listeners and/or participants finding the said discussion, talk, conversation, consultation and/or speech entertaining, enlightening, amusing and thought-provoking, it was also educational, informative useful and altogether beneficial.

Yours at all times and under all circumstances sincerely,

Roland Van Nappen

Case and Comment

Vendor and purchaser — damages on resale

The decision of Chilwell J in *Plowman v Dillon* [1985] BCL 1821 has particular significance with respect to the interpretation of cl 8.4 of the standard form Agreement for Sale and Purchase. The writer prepared a note with respect to *Plowman* but then realised that other recent decisions were also relevant. One was *Callander v Murphy* [1986] BCL 421. Another was *Edlin Holdings Limited v Carlisle* [1985] BCL 1683. The writer has not read *Edlin* but does not consider that this should prevent his approach from being empirical because it is with respect to *Plowman* and *Callander* that the writer wishes to take issue. The facts of and the decision in *Plowman* [1985] BCL 1821 have now been noted elsewhere so that the preliminaries may be dealt with briefly.

In *Plowman*, the purchaser failed to settle on time then failed to settle in accordance with the settlement notice. The vendor eventually resold the property and sued the purchaser for damages. The Agreement for Sale and Purchase contained a provision virtually identical to that in the current standard form of Agreement for Sale and Purchase approved by the Real Estate Institute of New Zealand and the New Zealand Law Society.

Clause 8.4(2) provided that:

> If on any bona fide resale contracted within one (1) year from the date by which the purchaser must settle in compliance with the settlement notice the vendor incurs a loss, the purchaser shall pay to the vendor as damages the amount of that loss which may include:
>
> (a) Interest at the interest rate for late settlement from the settlement date to the date of the vendor's cancellation and
>
> (b) All costs and expenses reasonably incurred in any resale or any attempted resale.

Clause 8.4(3) provided that:

> On any resale the vendor shall give credit for any deposit and any monies paid on account of the purchase price but any surplus monies shall be retained by the vendor.

Chilwell J allowed the following claims:

(a) Interest on the (balance of the) purchase price to the date of cancellation.
(b) The costs of an unsuccessful auction.
(c) The vendor's legal costs with respect to the unsuccessful auction.
(d) The vendor's legal costs in connection with the resale.
(e) The costs of having to have a mortgage "re-discharged".
(f) Loss arising by virtue of the fact that the vendor had to accept a lesser rate of interest on the mortgage back to the second purchaser than he would have obtained had the first transaction been settled.

Chilwell J disallowed the following damages claims:

(a) The vendor's legal costs in having a "Mortgage-back" prepared. This was because the mortgage had not been prepared in accordance with the provisions of the Agreement for Sale and Purchase and (on the facts), it was the purchaser's obligation anyway to tender (and on the facts, if necessary, prepare) a registrable mortgage.
(b) Agent's commission on the original sale (for the obvious reason that if the vendor was seeking to recover damages as if the contract had been performed, he could not also recover damages for expenditure which would have been incurred regardless).
(c) Interest on the balance of the deposit which had not been paid. The Judge considered that s 8(3)(a) of the Contractual Remedies Act 1979 would have prevented recovery of the deposit as such by the vendor. Accordingly, if the vendor could not recover the deposit, the vendor could hardly recover interest for non-payment of the deposit. (It had occurred to the writer that it would have been open to the vendor to have recovered the deposit as a debt. Although Dawson and McLauchlan appear to support this view (The Contractual Remedies Act 1979, p 134), Blanchard (3 ed para 307) disagrees. Prichard J has apparently adopted Blanchard's view in *Spencer v Crowther* [1986] BCL 422.)
(d) Loss of interest on the balance of the purchase price.
(e) Local authority rates and insurance premiums.
(f) Legal costs arising from the purchaser's default ie costs for attendances arising from the default of the purchaser in connection with the attempted settlement of the transaction.
(g) Costs of maintaining the property after the vendor had vacated it and until possession was given to the new buyer.

Although Plowman's case involves a number of interesting issues (including what the term "registrable" mortgage means) the writer wishes to concentrate on what the learned Judge had to say with respect to the remedies clause in general. (This note is already lengthy and in any case, since the original draft of this note was dictated, the other issues have at least been

summarised in other publications.)

Chilwell J held that the damages claims (d)-(g) above were irrecoverable because they fell outside the wording of cl 8.4(2) of the Agreement for Sale and Purchase. In the learned Judge's view, these losses did not arise on the resale. The Judge's reasoning was as follows.

First, having chosen to resell in terms of cl 8.4(1)(b)(iii) of the Agreement, the vendor was confined to damages in terms of the contractual criteria stipulated in cls 8.4(2) and (3). Being confined to those contractual criteria and having interpreted cl 8.4(2) so as to limit the vendor's recoverability to losses incurred on resale, the claims numbered (d)-(g) above by the vendor were "common law" claims and therefore irrecoverable. (See *Hoskins v Rule* [1952] NZLR 827.)

The writer wonders whether the learned Judge was correct. A literal interpretation of cl 8.4(2) might have suggested that if a loss did not arise directly on a resale, it would be irrecoverable. However, it is respectfully submitted that cl 8.4(2) was merely indicative (not definitive) of the types of damages or losses that the vendor could recover. The damages which the vendor could recover could "include" (for example) interest at the interest rate for late settlement from the settlement date to the date of the vendor's cancellation. Yet this loss would not arise as a result of the vendor having to resell. It is submitted that this indicates that the clause should perhaps have been interpreted as allowing the vendor to recover such losses as were attributable (within the normal remoteness tests) to the purchaser's failure to settle irrespective of whether these be defined as remedies provided for in the contract itself or arising from common law. (Even on this basis, some damages claims may still have failed eg the claim numbered (d) above because of the maxim expressio unis est exclusio alterius.)

It would appear that Hardie Boys J in *Edlin Holdings Limited v Carlisle* (supra) considered that cl 8.4 of the standard form Agreement "avoided the problems apparent from *Hoskins v Rule*". Presumably, similar arguments to those made by the writer were made to that Judge and certainly, similar arguments to those of the writer appear to have been made to Thorp J in *Callander v Murphy* (supra). However, Thorp J came to the same conclusions as Chilwell J in *Plowman*.

Thorp J considered that the words "which may include" in cl 8.4(2) "may be no more than a recognition that at least one of the remedies subsequently specified, (the right to interest . . .) would not be 'a loss incurred on resale' within the ordinary meaning of those words, and accordingly might not come within the remedies previously specified without specific authorisation". Further, the learned Judge placed some importance on the fact that "in Chilwell J's lengthy consideration of the new standard contract . . . in *Plowman v Dillon*, [the words 'which may include'] did not attract his attention at any stage". Finally, Thorp J made the following comment:

> Nor does it seem that if cl 8 is construed in the manner indicated it will fail to provide a reasonable, simple and comprehensive scheme to deal with defaults under the Contract, whether by vendor or purchaser in a manner likely to achieve effective justice in the great majority of cases.

With respect, it would seem at least arguable that it is precisely because the words "which may include" recognise that at least one of the remedies subsequently specified would not be a loss incurred on resale that cl 8.4 might deserve a wider interpretation. Further, and again with respect, the writer would not have thought that any importance could necessarily be attributed to the fact that Chilwell J did not comment upon the interpretation of these words.

The writer acknowledges that the interpretation placed on cl 8.4 by Chilwell J and Thorp J may be correct. However, even if that interpretation is correct, the writer respectfully disagrees with Thorp J when the learned Judge states that the clause as presently worded is likely to achieve effective justice in the great majority of cases. In the writer's view, there is no good reason for limiting the damages which a vendor should be able to recover from the purchaser if, because of the purchaser's default, the vendor has had to resell the property provided that the losses suffered by the vendor fall within the normal remoteness tests.

The writer submits that there is a good case therefore for amending cl 8.4(2), either by having the standard form Agreement reprinted or alternatively, by individual practitioners when acting for vendor clients. With respect, it seems simpler to have the clause amended (in one way or another) to provide certainty from the outset than for a solicitor to have to undertake the often difficult task of determining in advance what damages a Court might award to a vendor client if the vendor suffers an overall loss and depending upon whether the vendor resells pursuant to a contractual right or a common law right.

Further, by amending the clause so as to provide that the purchaser will be responsible for all contemplated losses which the vendor suffers as a result of having to resell the property, any shortcomings in the rules relating to an award of damages (either at common law or contractually) might be overcome.

It is difficult to gauge what other commentators think of these judgments. While the judgments have been summarised in other publications, the correctness or otherwise of the judgments has not been commented upon. The writer would respectfully submit that if the judgments are to be considered to be persuasive, a vendor is not satisfactorily protected by cl 8.4 of the standard form agreement as presently worded.

S Dukeson
Whangarei

Life bonds and tax

Marac Life Assurance Limited v The Commissioner of Inland Revenue [1986] BCL 561, decided by a full bench of five Judges in the Court of Appeal, concerns the taxation of the proceeds of certain life insurance policies which differed from ordinary life insurance policies in that they contained a substantial investment component.

The classic definition of "life insurance" is contained in *Bunyon on Life Assurance* (5th ed 1914) 1:

> The contract of life insurance may

> be further defined to be that in which one party agrees to pay a given sum upon the happening of a particular event contingent upon the duration of human life, in consideration of the immediate payment of a smaller sum or certain equivalent periodical payments by another.

The proceeds of life insurance policies have always been treated as not assessable to income tax. There is no specific provision to this effect in the Act. However, as Casey J pointed out:

> [l]ife insurance has always been treated as a separate and self-contained topic in taxation legislation and policy proceeds have been regarded as tax-free capital payments.

Why should this not apply to the Marac policies, or "Marac life bonds" as they were known? Because, argued the Commissioner, they were not life insurance but investments and, alternatively, even if they were life insurance, part of the proceeds paid on maturity were "interest" on "money lent" within the meaning of the definition in s 2 of the Act.

The bonds were taken out on payment of a premium. No further premiums were paid. They were for terms of one to five years or ten years with an option to extend for further terms. On maturity, or on the earlier death of the life assured, an amount would be paid which was equal to the single premium plus bonuses calculated at percentage rates per annum: 8 per cent for one year bonds; 9 per cent for two year bonds; 10 percent for three, four and five year bonds; 7 per cent for ten year bonds. In the ten year bonds, but not in those for lesser terms, there was a further provision that the policy would participate in the distribution of surplus by way of reversionary bonuses or otherwise, at such time and of such amounts as determined by the company.

In the High Court, Ongley J held that the bonds were policies of life insurance but that nevertheless the proceeds were assessable as "interest" on "money lent" in the hands of the bondholder. "Interest" is assessable under s 65(2)(j) of the Act. That term is defined in s 2 (as amended by s 3(1) and (2) of the Income Tax Amendment Act 1983) as follows:

> "Interest", in relation to the deriving of income or non-resident withholding income by any person, means every payment (not being a payment of money lent and not being a redemption payment), whether periodical or not and however described or computed, made to the person by any other person in respect of or in relation to money lent:
> "Money lent", in relation to any person, means –
> (a) . . .
> (b) . . .
> (c) . . .
> (d) Any amount paid to any other person in consideration for any agreement to pay or a promise to pay by the other person, where that amount is exceeded by the amount payable to the person pursuant to the agreement or the promise . . . .

It should be noted that para (d) was amended by ss 3(2) and (3) of the Income Tax Amendment Act (No 2) 1985. The new paragraph which applies in respect of interest from money lent pursuant to contracts entered into on or after the 29th of July 1983, is as follows:

> (d) Any amount paid to, or for the benefit of, or on behalf of or dealt with in the interest of or on behalf of, any other person in consideration for an agreement to pay or a promise to pay by the other person, where that amount is exceeded by the amount payable to the person pursuant to the agreement or the promise, –

Marac appealed from the ruling that the gains were assessable in the hands of the bond holders and the Commissioner appealed against the ruling that the bonds were policies of life insurance. In separate Judgments, each member of the Court held first, that the bonds were policies of life insurance and secondly, that the proceeds were not assessable.

As to the first issue, it was not disputed that the bonds involved the investment of moneys. As Cooke J said:

> [i]n the general sense all life insurance is investment. What distinguishes it from other kinds of investment is that the gain or yield, if there is one, depends on the contingencies of human life.

That was the case with the Marac bonds. And the fact that a purchaser of the bonds may be motivated by investment considerations that do not usually apply to insurance policies is irrelevant. As Richardson J said:

> [t]he principal question must be whether the transaction is properly characterised as a contract of life insurance (or endowment insurance), not whether the expected or guaranteed return makes it a good investment if the investor survives to maturity when the return is compared with straight lending transactions. Investors are free to enter into whatever lawful financial arrangements will suit their purpose.

The second issue was more difficult. Taken literally, the definitions of "interest" and "money lent" in the 1983 Amendment Act may have been wide enough to cover the Marac bonds.

Their Honours, however, declined to express final opinions on the point. Rather, they based their opinions on the long tradition in New Zealand of treating life insurance as a special case for tax purposes and, in particular, on recent amendments to the Income Tax Act from which it was inferred that interest on money lent was not meant to apply to life insurance. Having paid special attention to life insurance in those amendments, it was considered unlikely that Parliament would have intended those special provisions on "interest" and "money lent".

Apart from the point in issue, the case is noteworthy for the various aids that Their Honours used to assist them in reaching their conclusions. These included the application of principles of statutory interpretation, notably the maxim *generalia specialibus non derogant,* and a detailed consideration of the history of relevant legislation. They also included references to a wide range of extraneous materials: a Government Commission Report (Richardson J), promotional material put out by the taxpayer (McMullin J) and statements made in Parliament by the Minister of Finance (Cooke J and Somers J). The use of these aids is discussed further by Professor Burrows at [1986] NZLJ 100.

The Court of Appeal's conclusion that Parliament could not have intended the proceeds of life insurance policies to be assessable may not be the end of the matter. The Government has since indicated that while it does not intend to tax life insurance generally, it will consider taxing the proceeds of short term life insurance schemes containing a substantial investment component.

Andrew Alston
University of Canterbury

Conduct of sale of matrimonial home where its value was far out of the common run.

The issue before Barker J in *Leary v Leary* (High Court, Auckland; oral judgment 12 June 1986, No MP 279/86) was one of valuation of the parties' principal item of matrimonial property, their matrimonial home. Each of them realised it would have to be divided equally between them under the 1976 Act. The husband had acknowledged that the wife should be allowed to buy out his share of it, she being in a financial position to do this. By agreement, she now had possession of the home (which the Court regarded as "clearly a valuable one"), and the custody of the young child of the marriage. Three reputable registered valuers had valued the home at the respective figures of $600,000, $720,000 and $775,000. The wife had offered to buy the husband out at a figure based on a value of the property at $800,000. This would provide him with a sum free of any costs or commission payable on a sale.

The husband had provisionally rejected this offer because he considered that the market should be tested in order to ascertain the true value of the home. The wife had objected to visits to the property by agents and their clients and submitted that the fact of her offer – higher, it will be appreciated, than the highest valuation – indicated that such further steps were not necessary. She pointed to the emotional attachment she had to the house because of her years of work in restoring it (she was, in fact, an interior designer); to the unfortunate upsets which she and her husband had encountered in recent years, and to the child's need for security. The child was admittedly happy in the house, close to friends and in a familiar environment.

The husband now sought an order – either under R 322 of the High Court Rules or under the Court's general powers in relation to matrimonial property – granting inspection and access by agents and prospective purchasers.

His Honour said that he could understand the wife's desire for final resolution of the matter and her feeling that her present offer was reasonable. However, he considered that, "with a property of this dimension of value", the husband was "entitled to a limited order to enable him to see whether market forces can justify more or less than the valuers promise".

His Honour was led to this conclusion by the following evidence: first, the valuer who had valued the home at $720,000 considered that the property could attract a premium price from a specific purchaser and recommended a public auction with a reserve figure at no less than his valuation. A higher price was regarded by him as a definite possibility. Secondly, there was evidence that at least four real estate agents had made enquiries of the husband. Thirdly, and more importantly, another real estate agent (who was the Auckland Regional Sales Manager for a large real estate company) had taken it upon himself to introduce eight parties to the property, four of whom had inspected the grounds and the exterior. He claimed that each buyer was a cash buyer in the million dollar range and had quoted a sale price in the vicinity of $900,000 to $1 million. Aspersions appear to have been cast by the wife on that evidence, but the Court considered that there was no justification, without having seen or heard the witnesses, for finding those aspersions to be justified. The evidence must be accepted at its face value.

His Honour stated:

> Although, in cases involving property of a lesser value, the Court is inclined to take a "broad brush" approach in fixing value, I consider that, where the sole asset of the parties is of this order, the husband is entitled to see whether there is real evidence of market interest such as has been foreshadowed.

A further factor weighing with the Court was that the ultimate happening, so far as the matrimonial property was concerned, was for the Court to order a sale and equal division of the proceeds. Normally, the Court would order either a private sale or an auction with either party having the right to bid at the auction. In the present case, the husband could refuse to co-operate, as he had done to a limited extent – and could insist that the property go to auction. If that were to occur, then His Honour imagined that the inconvenience and distress to the wife would be considerably greater than that which was likely to happen in the very limited and conditional inspection which he now proposed to order. His Honour paused to record that the home in question was jointly owned and that there was no High Court or Family Court order giving the wife exclusive possession of it. The husband had been paying outgoings on the home (in which he had, in a self-contained basement, his professional office, which he was still using for his professional practice). He had not been paying child maintenance.

The order for inspection was as follows:–

1 The property was to be "placed in the hands of three only real estate firms or individuals practising as real estate agents, their identity to be decided by" the parties' solicitors.

2 Each agent was to be limited in the number of clients to be brought to the property. Initially, his Honour thought, no more than three clients per agent should be brought, but that was a matter on which discussions could usefully be held between the parties. Liberty was reserved to apply to the Court if no agreement could be reached.

3 The husband was to undertake to the Court (as he had in his affidavits) that he would have no contact with the agents at all; and was not to initiate any approach by a potential purchaser to any agent.

4 Any inspection of the property was to take place during school hours so that there was no disruption to the child.

5 The actual mode of obtaining access was something which could be discussed between the solicitors, though the wife would doubtless wish "to at least know when people were coming".

6 Reasonable notice was to be given by the agents of any impending visit.

7 Only genuine purchasers were to be shown through the property and "not just speculative persons who might have displayed some general interest". (If there were any abuse of this condition, then the matter might be referred to His Honour at short notice).
8 The agents and their clients were to conduct internal inspection of the property only to the bare minimum necessary and with minimum interference with the wife's privacy.
9 Any costs, commissions or expenses due to all or any of the agents were to be charged on the husband out of his eventual share. This condition was not to apply if there should be a sale consented to by both parties, whereby an agent had effectuated such a sale.
10 Any offers made were to be given by the agents to the solicitors for both parties. Such offers were to be conveyed by the agents to the solicitors of the parties and not to the parties themselves.
11 The total period for which the house was to be thus placed on the market was limited to six weeks from the date of the Judgment of the Court. (Barker J considered the suggested period of three months to be "far too long in all the circumstances if what is sought is merely to test the market".)

His Honour reserved liberty to apply in the light of what offers, if any, emerged. If nothing came out of this process, then, in his view, it would be in the parties' best interests to have the matter set down for hearing shortly. The parties were accordingly invited to file a praecipe to set the proceedings down for hearing. If necessary, a conference could be sought with His Honour through the Registrar, either under R 438 of the High Court Rules or, by consent, under R 442.

There was some discussion as to whether potential purchasers should be told that the wife might well be interested in making an offer herself. Counsel agreed that it would probably be undesirable, from the point of view of obtaining a really genuine offer, if any potential buyer were told this. The Court accordingly did not make such a condition.

Barker J finally referred to the ninth condition mentioned above. In making that condition, he had, he said, had in mind that any claim by an agent for having his or her time wasted through this exercise, which might legitimately be borne by one of the parties, should be borne by the husband solely. The question of costs was reserved.

P R H Webb
University of Auckland

Contracts — conditions — waiver

Moreton & Craig v Montrose Limited (in liquidation) [1986] BCL 780 involved a conditional agreement for sale and purchase. The conditions in the agreement related to the feasibility of and permission for the redevelopment of the property and if the conditions were not fulfilled, the contract was to be "null and void". After the time for fulfilment of the conditions, the purchasers purported to waive the conditions. The vendors considered that the purchasers had no right of unilateral waiver. (Wider issues than these were involved in the case but the writer only wishes to concentrate on the matter of unilateral waiver of conditions).

In the High Court, Henry J considered that the purchasers had no right to unilaterally waive the conditions, inter alia, because the fact that the contract was to be "null and void" for the nonfulfilment of the conditions indicated that the conditions were for the benefit of both parties. Henry J regarded the "null and void" provision as evidencing an intention that the purchaser could not unilaterally prevent the automatic termination of the contract for nonfulfilment of the conditions. In the Court of Appeal Cooke J and McMullin J agreed with Henry J. Casey J considered that the words "null and void" were not relevant to determining for whose benefit the conditions were. It is respectfully submitted that the Judgment of Casey J is both sensible and conceptually correct.

The fact that a contract may be expressed to be "null and void" or "voidable" only signifies the inevitable ie that the contract must terminate at some stage if a condition is not fulfilled (or waived) within the time allowed. The purpose of such a provision is surely only to inject certainty into the agreement and is irrelevant to the question of for whose benefit a condition has been inserted. It is submitted that that question must be answered by ascertaining why a condition has been inserted. This in turn will of course involve a certain amount of "contractual introspection".

The writer would go further than Casey J and suggest that in the present context, there is no need to distinguish beteween "void" and "voidable" contracts. In the writer's view, provisions relating to termination of a contract have no relevance to the issue of for whose benefit a condition has been inserted into an agreement. In this regard, it is difficult to accept the statement of Cooke J that:

> . . . when it is expressly agreed that in a certain event the contract shall be void or voidable by either party, . . . as a matter of interpretation such a clause is normally for the benefit of both and cannot be waived by one only.

It will be rare, particularly with respect to agreements for sale and purchase, that an agreement is not expressed to be either void or voidable. The writer respectfully agrees with Casey J that a provision to the effect that an agreement will be "null and void" is "neutral" (as should, in the writer's view, a provision to the effect that an agreement will be "voidable") and does not indicate one way or the other whether the condition to which it relates is exclusively for the benefit of either party.

To some extent, the issue of what relevance provisions relating to the termination of a contract have in determining for whose benefit a condition has been inserted is a philosophical one. (For this reason, the writer has abstained from referring to authorities of any kind in this note.) This is not surprising. Contracts is a particularly conceptual subject well suited to the time that academics have to devote to it. As practitioners, we often feel uncomfortable with it. (So, it would appear, do our Judges.) The ease with which different opinions can be given on contractual matters is amply demonstrated by the divergence in approach between the majority of the Court of Appeal and Casey J in the present case (and indeed by the divergence in approach to some contractual matters by Courts of equal standing within the Commonwealth).

It is suggested that solicitors should avoid any doubt as to for whose benefit a condition has been inserted into an agreement by, when

the opportunity arises, stipulating that a condition is for the sole benefit of their client (and that their client may unilaterally waive the condition). In this regard, conveyancers will realise that cl 7.2(4) of the standard form agreement for sale and purchase provides that the purchaser may waive any financial or other condition inserted for his sole benefit. (Presumably the wording of the clause is sufficiently clear as to deserve a disjunctive interpretation so that any financial condition is deemed to have been inserted for the purchaser's sole benefit and that the purchaser may therefore unilaterally waive the same ie that it is not still an open question as to whether a finance condition, like "any other condition", has been inserted for the sole benefit of the purchaser.)

S Dukeson
Whangarei

Indefeasibility of title under the Land Transfer Act

Dick v Dick [1986] BCL 779 is about a family dispute over Torrens system land and various possible exceptions to the principle that the estate of a registered proprietor is paramount.

The land in dispute was farm land near Opononi which had been owned by Murray and Hana Dick as tenants in common. Murray held 670 shares and Hana held 175 shares.

Murray died in 1973. By his will, he appointed Hana to be his executrix and trustee and he left his share in the land to one of his sons, Nathan Dick. Probate was granted to Hana and the land was transmitted to her as executrix. She should have then transferred the land to Nathan but she did not do so.

In 1977, Nathan died intestate. His wife, Prunella, and his children succeeded to his estate which, of course, included the land that he had inherited from his father. Yet Hana did not transfer it to them. She believed, on the basis of written advice – wrong advice – given by the Maori Affairs Department, that the land had reverted to her.

Hana then invited another son, Eric, and his wife, Elizabeth, to come and live with her on the farm and she said she would give it to them. After some hesitation, Eric and Elizabeth agreed. Before doing so, they sought advice from a solicitor who, after checking that Hana was shown on the title as executor and seeing the letter from the Maori Affairs Department but not the will, confirmed that she had the right to transfer the land as she chose.

The same solicitor attended to the conveyancing. To avoid gift duty, the farm, which was valued at $30,000, was transferred to Eric and Elizabeth for $15,000. Thus, at the outset, there was a gift of $15,000 and, in due course, there was to be another gift of $15,000 by way of forgiveness of debt. In fact, the debt was not forgiven. All the costs were paid by Eric and Elizabeth from the proceeds of the sale of their home in Auckland.

Eric and Elizabeth, having sold their home in Auckland, moved to Opononi and commenced building a house on the land. However, in 1982, Eric was badly injured in an accident; he couldn't work again and he and Elizabeth had to move back to Auckland so that he could receive medical treatment.

In 1983, Hana died and it was discovered that part of the land which she had transferred to Eric and Elizabeth had not been hers to transfer. Prunella Dick lodged a caveat against the title and, in due course, an action was brought in the High Court before Hillyer J to establish entitlement to the land of her late husband's estate.

For the action to succeed, it was necessary to show that it came within an exception to the principle, embodied in s 62 of the Land Transfer Act, that the estate of the registered proprietor is paramount.

There were four bases to the action: first, that the transfer was fraudulent; secondly, that Eric and Elizabeth were constructive trustees for the Nathan Dick estate; thirdly, that they were in a fiduciary position in relation to the estate; and fourthly, that they were volunteers and took title subject to the interests to which Hana Dick's title was subject.

The first basis – fraud – is an exception to the paramountcy principle expressly provided for in the Act s 62: "except in case of fraud"). The term is not defined in the Act and its meaning cannot be ascertained from the great mass of cases on fraud in contexts other than Torrens system legislation. The expression is *sui generis: Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd* [1923] NZLR 1137. It involves elements of dishonesty and moral turpitude: *Assets Co Ltd v Mere Roihi & Ors* [1905] AC 176, 210.

The nature of the fraud claimed in the present case was the alleged failure of Eric and Elizabeth to inquire and find out the estate's interest in the land after their suspicions were aroused as to its existence. This type of fraud was adverted to by Salmon J in *Assets Co Ltd v Mere Roihi & Ors* (supra) at p 210:

> The mere fact that he (the purchaser) might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not of itself prove fraud on his part. But, if it be shown that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may properly be ascribed to him.

However, on the facts, it was held that there was no moral turpitude on the part of the defendants and that they did not suspect the existence of any adverse right to the land.

The same findings were held to be sufficient to dispose of the allegation that Eric and Elizabeth were constructive trustees. This claim was dependent on a finding that they knew or ought to have known that the property came into their hands in breach of trust: *Belmont Finance Corporation Ltd v Williams Furniture Ltd No 2* [1980] 1 All ER 393 and *Bunt v Hallinan* [1985] 1 NZLR 450.

It may be easier to prove a constructive trust where the alleged trustee "ought to have known" than to prove fraud where "suspicions were aroused" but, nevertheless, the efforts of Eric and Elizabeth to ascertain their legal position and their reliance on their solicitor's advice, clearly established their innocence in both respects.

As to the third basis to the claim, that the defendants were in a fiduciary position in relation to the estate, Hillyer J did not think that there was any distinction between it and the claim that the defendants held the land as constructive trustees. Both were dependant on there being a degree of knowledge which was absent in this case.

The fourth basis to the action was that Eric and Elizabeth were volunteers and that they took title subject to the interests to which Hana Dick's title was subject. His Honour referred to Hinde, McMorland & Sim *Land Law* para 2.106:

A volunteer is probably in no better position than his transferor. The intention of the legislature expressed in the Land Transfer Act 1952 appears to be that on registration of a voluntary transfer the transferee should be in no better position as regards indefeasibility of title than his transferor. This view is supported by Baalman, who reasons thus:

> S [62] makes no express distinction . . . between the measure of indefeasibility enjoyed by a volunteer and that of a registered proprietor who acquired title under a dealing for value. But throughout the Act there are significant references to "purchasers" and "for value", which leave little doubt that a distinction was intended. These references occur in ss [63(1)(c) and (d), and 183]. The effect of s [63(1)(c)] is that if B becomes registered as proprietor of A"s land by virtue of a fraudulent transfer, A can bring an action of ejectment because the title obtained by B"s fraud is not indefeasible. Not only could A bring his action against B, but he could bring ejectment also against "a person deriving otherwise than as a transferee bona fide for value from or through" B: s [63(1)(c)]. To expose a volunteer to ejectment in that manner is to deny him indefeasibility of title. Accordingly s [63(1)(c)] constitutes an exception to indefeasibility which must be read into s [62]. That view is supported by s [183] which protects, in a negative way,
>
> "[any] purchaser or mortgagee bona fide for valuable consideration."

His Honour held that the cause of action on this basis could not succeed for two reasons: first, because Eric and Elizabeth were not volunteers and secondly, because Hana was not registered as proprietor through fraud and, in his view, the rule only applies where a person gets title from a proprietor who was so registered.

As to the first reason, His Honour quite rightly pointed out that Eric and Elizabeth were not volunteers in the sense of giving no consideration. On the surface of the transaction, they paid $30,000 of which $15,000 may still have been owing. In addition, there was consideration in the agreement that in return for title to the land they would live near Hana and be available to look after and assist her, and in the fact that they would be keeping the land in the family.

As to the second reason, however, it is questionable that the rule only applies where a person gets title from a person who was registered through fraud. This implication seems to have been drawn from looking at s 63(1)(c) in isolation but it ignores ss 63(1)(d) and 193(1) which also distinguish between a volunteer and a purchaser for value and are not necessarily dependent on a requirement of fraud. It is these sections, together with s 63(1)(c), which lead to the conclusion that volunteers are not intended to have the benefit of indefeasability of title.

This conclusion is supported by case authority, in particular, Lord Watson's classic *dictum* in *Gibbs v Messer* [1981] AC 248.

> The object of (the Act) is to save persons dealing with registered proprietors from the trouble and expense of going behind the register in order to investigate the history of their author's title and to satisfy themselves of its validity. That end is accomplished by providing that everyone *who purchases in bona fide and for value* from a registered proprietor and enters his deed of transfer or mortgage in the register shall thereby acquire an indefeasible right notwithstanding the infirmity of his author's title.

And, in *King v Smail* [1985] VR 273, where it was held that the Victorian Transfer of Land Act 1954 did not confer upon a registered proprietor a title free from prior equities, no qualification was made that the transferee must have been registered through fraud. In fact, as it was not held that there was any element of fraud in that case, if there had been such a limitation to the rule, the decision would have been quite different.

Having decided all four issues in favour of the defendants, Hillyer J refused the plaintiff's claim for a declaration that the defendants hold a share in the land as trustees for the plaintiff and ordered that the caveat be removed.

Andrew Alston
University of Canterbury

Correction

In the July issue of the *New Zealand Law Journal* at [1986] NZLJ 223 there is a case comment by John Hughes on the case of *Horsburgh v NZ Meat Processors etc IUW.* The reference to the case in *Butterworths Current Law* incorrectly cites the page instead of the paragraph reference. The correct citation is [1986] BCL 350.

In the same case note the name of the trial Judge is incorrectly given as Cooke J, whereas it should have read Cook J. Apologies for this error are made to the two Judges and to the author.

Law Society Pop

Under the above heading a piece appeared in the Solicitors' Journal *(1986) 130 SJ 455 indicating the sort of advertising the Law Society in England is prepared to undertake.*

To make young people realise their right to see a solicitor if they are taken to a police station, the Law Society is to spend £50,000 over the next few weeks on publicity in pop musical weeklies, the *Sun, Daily Mirror* and on the air on Radio Luxembourg. If this is not enough to make our Victorian predecessors turn in their graves, what would they have thought of the fact that the scheme is masterminded by advertising agents, and the copy written by someone in the 15-24 age group, the prime target of the Society? The radio station allows advertising by way of commentary between records, so it is hoped that the disc jockey playing the top 40 will also speak the lines of the 60 or so slots the Society has bought. It is thought that the young listeners will relate to such a big brother. We shall never know, because there is to be no follow up research to assess the campaign's effectiveness. But if figures are up on requests for duty solicitors, then it will be deemed to have done its bit for us all.

Mortgages and Registrar's sales

By J R Flaws, an Auckland practitioner

This article comments on the article by S Dukeson published at [1986] NZLJ 63. The author suggests that sale through the Registrar is an over-used method of exercising a power of sale. The article deals with such questions as the equity of redemption, the position regarding prior and subsequent mortgages, and the duty of care. A brief response by Mr Dukeson is appended.

The following are a few comments in response to the invitation by Mr S Dukeson in his article at [1986] NZLJ 63.

There are several misconceptions regarding the Registrar's sale which should be laid to rest. First, it is not the only way in which the power of sale can be exercised. The mortgagee's power to sell the mortgaged property, if not given in the mortgage, is implied by the Fourth Schedule to the Property Law Act 1952. A sale by auction is only one method contemplated by the implied powers. Secondly, it does not confer, per se, any overriding blessing of approval to cure any reckless abuse of the exercise of the power. It does not absolve the mortgagee from the "duty of care" or more correctly, the obligation to act fairly to obtain a proper price in the circumstances prevailing at the time of exercise of the power.

The device of a Registrar's sale was created solely to provide the means by which a mortgagee can buy in and become the owner of the mortgaged property.

In *Bagnall v Clements* [1928] NZLR 737 at 742, Reed J considered the Registrar's position in the following terms:

> The provisions of the Act, therefore, are all directed to the sale of the property "to the mortgagee". Any other dealing with the mortgage is and remains in the hands of the mortgagee alone. The various steps prescribed to be taken by the Registrar are intended to be for the protection of the mortgagor by securing that if the mortgagee becomes a purchaser he does so in open competition at an auction of which due publicity has been given. If the mortgagee does not purchase, then the Registrar has nothing more to do with the matter whatsoever. For all practical purposes it is as if it had never been through his hands. Even when the mortgagee is the purchaser the duties of the Registrar are strictly limited to those definitely imposed upon him by the statute.

The supervisory role that the Registrar exercises is designed, therefore, only to ensure that if the mortgagee does buy it, it is in circumstances that are fair as between the mortgagee and the mortgagor. The mortgagor is given a reasonable time to "buy back" the property at no more than the price that the mortgagee is prepared to pay for it and the particulars and conditions of the sale and the extent of the advertising are scrutinised by the Registrar. Bear in mind the comments of Reed J and, I would suggest, many of the answers to Mr Dukeson's questions become apparent.

Equity of redemption and the power of sale

When the English colonised this country they brought with them the system of land tenure (at least for that land which they were able to bring under the system by acquisition or confiscation) which had developed in England. An owner of land wishing to use the land to secure repayment of a debt transferred the legal title to the creditor subject to the owner's equitable right to redeem the legal title upon repayment of the debt. If the owner did not repay, the equity of redemption was foreclosed and the creditor's legal ownership became absolute, free from the equitable interest of the mortgagor. The mortgagee was thus the owner and free to deal with the land as the mortgagee pleased. The Courts of Equity, however required the mortgagee to follow certain procedures before the foreclosure was consummated in order to ensure that the owner did not unfairly lose his land.

One of the attractions of a mortgage investment may have been the ability for the mortgagee to foreclose the equity of redemption, and become the clear legal owner of the property. The ownership of the property by means of foreclosure was not the only method of realising the security for it became customary to include in a mortgage a power to sell the property to a third party without first becoming the owner by foreclosure. The Courts did not allow the power of sale to be used as a means of avoiding the foreclosure supervision if the mortgagee was to become the owner. A sale to a mortgagee pursuant to the power of sale was therefore a nullity and only a true third party could acquire good title from the mortgagee (*Farrar v Farrars Limited* (1888) 40 ChD 395).

When the Torrens system was adopted in New Zealand, a mortgage no longer operated as a transfer of the legal estate but simply as a charge upon it. Notwithstanding the use of the expression "equity of redemption" in the section heading to s 81 of the Property Law Act 1952, the right

given in that section, (at least in relation to Land Transfer land) is a legal and not an equitable right. A Land Transfer mortgage would clearly have a reduced appeal to a mortgagee if the foreclosure route were lost and a sale to a third party were the only means of recovering the debt on default. The Registrar's sale was therefore instituted to replace the foreclosure procedure, and enable the mortgagee to become owner of the land. The Conveyancing Ordinance Amendment Act 1860, first introduced the concept.

At first it was enough that a sale be conducted by the Registrar. Unlike our neighbours, our early colonists perceived our country as being colonised by gentlemen rather than convicts. If a gentleman were to buy in at a Registrar's sale at a gross undervalue, even less than the amount due under the mortgage, he could not in good conscience sue the mortgagor for the deficiency. This was the basis of the defendant's argument in the case of *Hamilton v Bank of New Zealand* (1904) 24 NZLR 109. Edwards J, in the Court of Appeal, called upon his experiences during a "somewhat long professional practice" and found that he had never known of an instance of the recovery of any part of the balance of the mortgage money from the mortgagor after a Registrar's sale. He indicated that the custom for mortgagees to buy in at as low a price as possible was not intended to defraud the mortgagor but to avoid stamp duty. It was considered that the possibility of an action to recover the deficit existed but that it was for the Legislature, not the Courts, to prevent this injustice.

Shortly after the *Hamilton* case, the Legislature acknowledged that not all mortgagors were gentlemen and the device of the "estimate of value" was created. The initial misnaming of this device has been corrected and now it more properly indicates that it is the sum (or more correctly one of the two sums) which the mortgagor can pay the mortgagee and redeem the land. The other sum being the amount actually owing under the mortgage.

The purpose of the redemption price (as it is now called) is to require the mortgagee to advise the mortgagor of the minimum price the mortgagee is obliged to pay if the mortgagee bids and buys in at the auction. If this is less than the amount due under the mortgage, the mortgagor is given the opportunity to buy back, or redeem the land at the price quoted by the mortgagee. If it is more, possibly because it includes prior mortgage amounts which the mortgagee need only pay or redeem at the amount due under the mortgage.

The redemption price does not require any further definition. It acquires its meaning, its definition, by what it achieves, not by what it says it is going to do.

Prior and subsequent mortgages

Because the redemption price is a matter between the mortgagee and the mortgagor, it does not, as Mr Dukeson has discovered "protect" any subsequent mortgagee. It does not need to. The right that a mortgagor has to redeem is also given by the Common Law to a subsequent encumbrancer. Section 83 of the Property Law Act 1952 indicates that an extension of the right to redeem (namely the right to have an assignment given to a third party) is given to a subsequent encumbrancer in priority to the mortgagor's right. If, then, a subsequent mortgagee is unhappy with the redemption price stated by a prior mortgagee, the subsequent mortgagee is in no worse a position than the mortgagor. Possibly because the subsequent mortgagee's right to redeem takes priority over the mortgagor's right, the position of a subsequent mortgagee is stronger. What more protection is needed. Accepting the risk of lending on a subsequent mortgage is an acknowledgement of the right of a prior mortgagee to proceed to exercise a power of sale in a proper way.

When a subsequent mortgagee is selling, it is the right to redeem prior mortgages which enables the mortgagee as a matter of practice to include the amounts owing to prior mortgagees when calculating the redemption price. Not only was Cain correct when suggesting that this would be possible, but he was referring to a very sensible and practical procedure that had developed.

Virtually all mortgages now contain a right to call up the principal sum in the event of a sale. A subsequent mortgagee exercising the power of sale has a better chance of obtaining a purchaser if the carrot of a clear and unencumbered title can be held out to prospective purchasers. To provide such a title the mortgagee selling assumes the obligation of paying out all prior mortgagees prior to conveying the property to the purchaser. At this point, as Mr Dukeson correctly points out, the provisions of s 104 of the Land Transfer Act 1952 apply to dictate the order of the application of the proceeds of the sale. In essence, the subsequent mortgagee provides clear title to the purchaser by repaying prior mortgagees immediately before settlement and the amounts repaid are then secured under the subsequent mortgage. If the property is bought by the mortgagee at the auction then the same procedure applies, with the exception that the amount to repay the prior mortgages must be found from the subsequent mortgagee's own resources.

To give an example of how the redemption price can work, in a recent case a mortgagee held one mortgage over two properties. On each property there were prior mortgages. For practical reasons (the properties were separate) it was appropriate to sell each property by a separate auction. In relation to each property the amount of the prior mortgages and the total amount owing to the subsequent mortgagee exceeded the value of the property. In calculating the redemption price it was necessary to consider the sum at which the mortgagee would be prepared to purchase each property. Once stated, the mortgagor had the opportunity of obtaining a partial release of the mortgage over each property by paying the redemption price rather than the total amount owing under the mortgage. When the redemption prices for each property were calculated using this criterion the mortgagee was fully protected. If by chance only one of the properties were redeemed by the mortgagor then that reduced the amount owing under the mortgage to a sum less than the redemption price on the other property. At that point either the redemption price could be restated or alternatively that sale could be withdrawn and a further sale applied for with a fresh redemption price at a lesser figure.

Duty of care

The New Zealand Court of Appeal in the case of *Alexandre v New Zealand Breweries Limited* [1974] 1 NZLR 497 assumed a "duty of care" existed. It felt it could only make the assumption because it was heard not long after the case of *Cuckmere Brick Co Ltd v Mutual Finance Limited* (1971) 1 Ch 949 and no argument was presented on the law applied in that case. The Court of Appeal, having made the assumption then applied the "duty of care" test as outlined in the *Cuckmere* case to a New Zealand mortgagee's sale. It found, in the circumstances, that the duty had not been breached. What is important for us is not the making of the assumption, nor even its application in the particular case, but that the *Alexandre* sale was held under conduct of the Registrar and the Court of Appeal applied the test regardless of this fact.

Indeed, if the facts of the *Cuckmere* case were to have occurred in New Zealand at a Registrar's Sale, it would still have been considered by our Courts, and, the outcome should have been the same regardless of the Registrar's involvement. The "duty of care" was broken in the *Cuckmere* case because an advertisement referred to a less advantageous planning approval and the mortgagee and its agents were, or should have been aware of this.

To put the "duty of care" in its context the Registrar's requirements under s 99(2) of the Property Law Act 1952 should be considered. Under this subsection the Registrar shall:

(a) Fix a convenient time (being not more than three months and not less than 1 month from the date of the application) and a convenient place for the conduct of the sale.

The period of at least one month has the effect of giving the mortgagor a reasonable period to re-arrange his affairs so that he might redeem the property at the mortgagor's redemption price. The convenient time and place are simply to ensure that an unfair auction is not held at a strange time in a strange location.

(b) Give written notice to any person (including the mortgagor) whose name and address has been supplied to him by the applicant under subs 1(a) of this section of the time and place at which the sale is to be conducted and of the redemption price.

The purpose being to ensure that the mortgagor and all other subsequent encumbrancers are told of the redemption price and the time and place of auction.

(c) Give such notice of the sale by advertisement in a newspaper circulating in the neighbourhood as he considers sufficient.

This provision simply relates to the general size and nature of the advertisement and the sufficiency of the advertising. It does not impose any obligation on the Registrar to ensure that the advertising is correct, or that any other material information is included in the advertisement. This obligation, as in the *Cuckmere* case, must still rest with the mortgagee who is exercising the power of sale.

(d) Approve of proper conditions of sale, employ an auctioneer, and do all other things necessary for the proper conduct of the sale.

This is designed to ensure that the auction is not a sham and the conditions of purchase are consistent with the accepted standards.

From the above it appears that the Registrar's task is only to ensure that, within a restricted range of items, a proper price is paid by the mortgagee in fair circumstances. If the mortgagee buys in at a low price then the mortgagor cannot claim he has been disadvantaged for he has also had the opportunity to buy back at the same price. If, because of market conditions no one else attends the auction, that cannot on its own be cause for complaint by the mortgagor. If, however, the mortgagee includes incorrect or misleading information in or omits relevant facts from the advertisement, then I would suggest the mortgagee may still be liable for a breach of the "duty of care".

What then is this "duty of care"? It is only a duty to be fair and obtain a proper price in the circumstances. The circumstances being a balancing of the mortgagee's right to recover the debt by selling the property under the market conditions prevailing at the time of the sale against the mortgagors rights to expect a fair price obtained by a fair sale. It cannot be the duty of a trustee for by executing a mortgage, the mortgagor is representing to the mortgagee that, in default of payment by the mortgagor, the mortgagee may use the sale of the property as a source of repayment. It is, however, more than just a requirement to cash up at all costs in a reckless or wilful manner without regard to the proper value of the property.

Like the redemption price, I would suggest that the duty of care owed by a mortgagee works in practice not by any fine definition but by a mortgagee acting responsibly and doing what is reasonable to sell the property to recover the debt. If the mortgagee does not wish to buy in then the mortgagee need not be frightened by the duty of care when contemplating a private sale. If selling by auction, meeting the same notice, advertising and conditions of sale requirements as the Registrar is not a difficult task. Even in the case of a sale by private treaty, I would suggest that if a sale is achieved at not less than the price determined by a registered valuer to be a fair market value, the duty of care should have been satisfied.

Conclusion

In conclusion, I would suggest that the Registrar's sale is a much over-used and over-rated method of exercising the power of sale. When considered in its context, it provided a very practical and fair means of achieving its desired function, a sale to the mortgagee. In a country where most properties are sold by private treaty rather than auction, it may be questionable whether the use of a Registrar's sale is a reasonable exercise of the power of sale when the mortgagee does not wish or is unable to buy in. □

Response by S Dukeson

The writer understands that Mr Flaws wrote a thesis on mortgagee sales. Unfortunately, most practitioners involved with respect to mortgagee sales will not have had the same opportunity to undertake that depth of research. Further, many such practitioners will not have had the opportunity to specialise in that area of the law. Such practitioners have to

rely on what information is available in the literature and their own judgment.

In this regard, the writer endeavoured to make two main points in his article. The first was that the legal principles applicable to mortgagee sales through the Registrar were not satisfactorily explained or even discussed in the available literature. The second was that, at least to the relatively "inexperienced", the application of these legal principles seemed to conflict with the practice of some solicitors.

As the writer is one of the relatively "inexperienced" in this area of the law it would be impertinent for him to comment in any detail on Mr Flaws' article. Further, Mr Flaws purports to have expertise in this area and in the writer's view, additional literature with respect to mortgagee sales should be welcomed. However, the writer makes the following comments:

1 With respect, the writer doubts that there is any misconception that a sale through the Registrar is the only method of mortgage sale.
2 If what Mr Flaws has to say with respect to the inclusion of the amount owing under prior mortgages in the redemption price is correct, this helps to reconcile strict legal principle with legal practice. (The writer understood that some solicitors were simply including the amount of prior mortgages in the redemption price and repaying those mortgages from sale proceeds. Section 104 of the Land Transfer Act 1952 precludes this.)
However, the writer respectfully suggests that a further discussion of s 83 of the Property Law Act 1952 would be a welcome addition to the literature. The writer is sure that many practitioners are not only unaware of the section but would be unsure of its meaning and its implications.
3 With respect, the writer is unable to see how Mr Flaws' conclusion follows from the body of his article. The writer has insufficient experience to make any comment of his own as to whether a private sale would generally be more advantageous than a sale through the Registrar. It is suggested that this is another point which could be usefully discussed by someone with expertise in this area. □

Correspondence

Sir

re: Life and Art

I have been haunted by an elusive recollection because of which the quaint proposal (by supporters of a bill of rights) to give Judges power to overrule statutes has seemed oddly familiar. I have now tracked down the source of this memory. Consider these words (spoken by a Lord Chancellor):

> The pity is that there is not more Judge-made law. For most of His Majesty's Judges are much better fitted for the making of laws than the queer and cowardly rabble who are elected to Parliament for that purpose by the fantastic machinery of universal suffrage. . . . Nearly all the laws recently enacted by Parliament are vexatious and foolish, yet we are expected to enforce them as jealously as if they were necessary and good. My Lords, we are venerable, dignified, and wise, superior in almost every respect to the elected legislators of the House of Commons; yet like the rest of His Majesty's Judges, we find ourselves in the position of hired dispensers, compelled continually to dispense the prescriptions of a crazy doctor, which they know to be ineffective and even poisonous. My Lords, is it good enough? My Lords, it is not. My Lords, I give notice that from this day forth it is my intention to decide such disputes as come before me in accordance with my own good sense and judgment, ignoring both precedent and Parliament where they are opposed to me. As for the House of Commons, my Lords, the House of Commons be blowed!

Is it not plain that in New Zealand today there are one or more uppity Judges who hold quite seriously sentiments identical in essence to those contained in the words quoted (which were in fact written for comic effect in 1928 by A P Herbert the creator of Albert Haddock)? "Life holds the mirror up to Art, and either reproduces some strange type imagined by painter or sculptor, or realizes in fact what has been dreamed in fiction".

D F Dugdale

Sir

I was surprised to read the article by Mr Elkind in your June issue. It seems to me that the emotive vituperation it contains is out of place in a professional publication.

Democracy resides in the hearts and minds of the individuals who make up a nation; in the will of those in power, the Prime Minister, the heads of the armed forces, the police, the media and industry to subordinate their own desires to those of the mass of the people. Above all in the will of the ordinary person to say "they mustn't do that!"

By and large, a nation gets what it wants. Revolutions in Iran and the Philippines have shown this recently. All that lawyers can do is to formulate and record the will of the people: but no words written on paper as to what is legal or illegal will ensure what people want. If the nation occasionally allows its opinion to be dominated by what Mr Elkind considers to be "irrational forces" – too bad! but no copper plated Bill of Rights can insure this country's future.

R F V Rutter

Reasonable certainty

I speak of probability, here, with respect to crimes, when it would seem that certainty is demanded if they are to deserve punishment. But the paradox will vanish if one considers that, strictly speaking, moral certainty is never more than a probability, but a probability that is called certainty, because every man of good sense naturally gives his assent to it by force of a habit which arises from the necessity to act and is anterior to all speculation. The certainty required to prove a man guilty, therefore, is that which determines every man in the most important transactions of his life.

— Beccaria
on Crimes and Punishments (1764)

Ultra vires further considered:

The *Rolled Steel* case and the Memorandum of Association in New Zealand Company Law

By Peter G Watts, Lecturer in Law, University of Auckland

The author of this article is Mr Peter Watts who is a lecturer in the Law Faculty of the University of Auckland, and is one of the group of Contributing Editors who will in future be servicing volume 2 of Morison's Company Law. *Recent statutory amendments to the New Zealand Companies Act have effected a substantial change in the law in respect of the doctrine of ultra vires. Giora Shapira at [1985] NZLJ 124 pointed out that the principle was by no means irrelevant but continues to have some legal significance. Mr Peter Watts in this article also has the view that the scope and exercise of the powers of directors in terms of the Memorandum of Association are still relevant legal issues. He considers the implications of the recent decision in* Rolled Steel Products (Holdings) Ltd v British Steel Corporation *[1985] 3 All ER 52 of the English Court of Appeal. He considers the decision to be novel, unhelpful and misguided. He suggests that the law of ultra vires needs further thought and that the statutory reforms of 1983 ought to be reconsidered.*

The Judgments of the English Court of Appeal in *Rolled Steel Products (Holdings) Ltd v British Steel Corporation* [1985] 2 WLR 908, [1985] 3 All ER 52, [1984] BCLC 466 are of serious import for the role of the memorandum of association in company law.

It is stated at the outset that this writer considers the decision in *Rolled Steel* in relation to the memorandum to be novel, unhelpful and misguided. Before analysing the case, however, it is necessary to outline why the memorandum and the ultra vires doctrine continue to be important in New Zealand company law, despite the Companies Amendment Acts of 1983 and 1985.

The continuing relevance of the Memorandum of Association in New Zealand

The Companies Amendment Act (No 2) 1983 substantially reduced the application of the law of ultra vires to companies formed under the Companies Act 1955. Nevertheless, so long as most existing New Zealand companies incorporated before 1 January 1984 continue to have memoranda of association which state objects and powers, it can by no means be assumed that these memoranda can be ignored by persons who deal with the relevant companies! This is so for these reasons, and perhaps others:

(a) Although s 18A(1) of the 1955 Act provides that nothing done by a company shall be "invalid, void, or unenforceable by reason only of the fact that the company was without capacity or power to do it . . .", s 18A(2) goes on to provide that subs (1) does not apply to proceedings brought against the relevant company by a member of the company or a floating charge holder to prevent the doing of an act outside the company's capacity. Plainly included amongst ultra vires acts which may be so restrained is not only the entry into an ultra vires contract but also the performance at any stage by the company of such a contract. Section 18A(3) confers on the Court a discretion to grant relief to the parties to an ultra vires contract in respect of any loss or damage which may be sustained as a result of the company being prevented from performing the contract under s 18A(2). It is evident that such relief cannot encompass a validation of the contract itself, and it is therefore likely that "loss or damage" in s 18A(3) means only reliance loss and damage and not expectation loss and damage. The possibility of proceedings being brought by shareholders and floating charge holders cannot be regarded as theoretical,[2] particulary if, as suggested by one commentator, a liquidator might be able to exercise the members' rights under s 18A(2) should the company go into liquidation (see M W Russell [1984] NZLJ 132, 134, citing *Re Halt Garage (1964) Ltd* [1982] 3 All ER 1016, 1036). The availability of proceedings under s 18A(2) detracts very substantially from the merits of the 1983 reforms. Indeed, it is ironic that in the year New Zealand borrowed the provisions of s 18A from Australia, the Australian States substantially amended their legislation, including the removal of their equivalent of s 18A(2). (In fact the Australians have had substantially to further amend their legislation — see now ss

46-50 Companies and Securities (Miscellaneous Amendments) Act 1985 (Cth).)

(b) It is now possible that the Companies Amendment Act 1985 has further eroded the value of the 1983 amendments, by providing in new s 18C(1) of the 1955 Act that the relevant company itself can assert against a person dealing with it that its memorandum has not been complied with if the person knew or, by reason of relationship to the company, ought to have known of the non-compliance. Before the 1985 amendment it had been assumed that the 1983 amendments applied irrespective of the knowledge of the person dealing with the company; (see for example, R Burgess (1984) 11 NZULR 199, 205).

(c) Even if it is not possible for a transaction to be challenged on the grounds that it is ultra vires the company it may still be possible for the transaction to be attacked on the grounds that it was entered into beyond the power of the directors, the powers of whom continue to be governed by the terms of the relevant memorandum and articles of association. Most unfortunately, the 1983 amendments did not address this aspect of the legal consequences which are derived from the statement of objects and powers in the memorandum, and the 1985 amendments in large part only codify the common law on these matters. In fact, *Rolled Steel* itself has affirmed and underlined the relevance of the memorandum to the scope and exercise of directors' powers.

The Rolled Steel decision

The decision in *Rolled Steel* can be summarised in this way:

(1) The main contract in question in *Rolled Steel* was a guarantee given by Rolled Steel to a company (Colvilles Ltd), the assets and obligations of which had, before trial, been succeeded to by the British Steel Corporation ("BSC") under governmental order. The guarantee was of a debt for £383,084 owed to Colvilles by Scottish Steel Sheet Ltd ("SSS"), a company owned by the majority shareholder in Rolled Steel. The guarantee was subsequently supported by the delivery to Colvilles of a debenture creating charges over Rolled Steel's assets;

(2) Vinelott J at first instance and the Court of Appeal found as facts that, whatever formal consideration was given for the guarantee and charges, in essence they "were not entered into by Rolled Steel for any purpose of Rolled Steel but were a gratuitous disposition of the property of Rolled Steel and were entered into for the benefit of SSS and Mr Shenkman [the common shareholder] personally" ([1982] Ch 478, 507 per Vinelott J and [1985] 3 All ER 52, 72-73 per Slade LJ);

(3) The memorandum of association of Rolled Steel included the following standard form clause:

> to lend and advance money or give credit to such persons, firms, or companies and on such terms as may seem expedient, and in particular to customers of and others having dealings with the Company, and to give guarantees or become security for any such persons, firms, or companies.
>
> The memorandum also provided for the securing of guarantees and other obligations, and had a standard form independent objects (*Cotman v Brougham*) clause;

(4) Rolled Steel subsequently went into liquidation and the proceedings were brought against BSC and its receiver for declarations that the guarantee and debenture were void and for recovery of the proceeds of the realisation of Rolled Steel's assets pursuant to the debenture;

(5) This relief was sought on three grounds:

(a) The guarantee and debenture were ultra vires Rolled Steel;

(b) The guarantee and debenture were entered into in breach of the duties of the directors of Rolled Steel. In fact, as pleaded, this head of claim was only used to seek to make the defendants liable as constructive trustees for the misapplied proceeds of Rolled Steel and not to have the guarantee and debenture declared void; and

(c) The guarantee and debenture were not authorised by Rolled Steel because of non-compliance with the articles of association of the company as a result of the personal interest of Mr Shenkman in the transactions.

(6) The Court of Appeal held that:

(a) The guarantee and debenture were not ultra vires the company, not because of the presence of the independent objects clause, but merely because the company actually had express powers to guarantee and to secure guarantees in its memorandum. It was held irrelevant as far as the law of ultra vires was concerned that the powers were exercised for purposes or objects outside those permitted by the memorandum;

(b) Despite not being ultra vires, and although not pleaded in this way, Colvilles and BSC, in the words of Slade LJ, "acquired no rights" under the guarantee and the debenture (to the extent that the debenture supported the guarantee), because they were entered into "beyond the authority of the directors", whose authority was governed by the objects and powers set out in the memorandum ([1985] 3 All ER 52, 87 e-g). Slade LJ held, despite the independent objects clause, that the power to guarantee was only exercisable for the purposes of the company's business and in this case the exercise was gratuitous. Browne-Wilkinson LJ agreed with Slade LJ but referred to the transaction as having been entered into in abuse of the

company's powers ([1985] 3 All ER 52, 92c and 94g) as well as referring to an abuse of the directors' powers (ibid p 94c);

(c) The guarantee and debenture were void also on the ground that they were entered into in breach of the articles dealing with the procedures involved where a director was interested in a transaction.

Although the Court's holding on the interested directors' problem is also controversial,[3] it is only proposed to analyse the Court's holdings on the ultra vires and directors' authority points.

A Novel decision

One writer, (A Clark, "Ultra Vires after *Rolled Steel Products"* (1985) 6 Co Law 155) has described the decision of the Court of Appeal on the ultra vires point as having a "bizarre pedigree". This description results from the way in which the Court, in reaching its decision, had to deal with two earlier decisions of the English Court of Appeal (*Re David Payne & Co Ltd* [1904] 2 Ch 608 and *Re Introductions Ltd* [1970] Ch 199). These decisions had almost universally been understood as ultra vires cases but the Court in *Rolled Steel* treated them as decisions only on abuse of directors' powers.

The two cases involved loans which resulted in the borrowed funds being expended on ultra vires objects. It is true that Buckley J in *David Payne*, who was upheld on appeal, did refer to the matter in question as being one only between the shareholders and directors (see the passages quoted with approval by Slade LJ at [1985] 3 All ER 52, 82). However, it is suggested that the true explanation of Buckley J's dictum is that the application by the company of the borrowed money on objects outside the memorandum of association was, as far as the innocent lenders were concerned, a decision made after the contract of loan had been entered into and performed by the lenders, and, therefore, an act independent of the contract. In these circumstances, the only remedy open to the company was to sue its directors for misapplication of company funds. Thus, contrary to the view of the Court in *Rolled Steel*, the case is not authority for a proposition that all contracts entered into pursuant to express powers but for wrongful purposes are intra vires the company, albeit outside the directors' powers.

In revising the common understanding of *Re Introductions*, it was necessary for the Court in *Rolled Steel* to characterise as improper the use of the label "ultra vires" to describe a misuse of express powers for objects outside those permitted by the memorandum, even though this was the use that had been made of the phrase by such respected Chancery lawyers as Buckley J at first instance and Harman and Russell LJJ. In fact, Slade LJ did recognise that, even if it were possible to suggest that Harman LJ was referring to abuse of directors' powers when he used the phrase ultra vires, it was more difficult to do so in relation to Russell LJ. In this event, Slade LJ distinguished Russell LJ's Judgment on its facts on the grounds that in *Re Introductions* the whole undertaking of the company had become directed to ultra vires activities and, therefore, any borrowing or other transaction to further the operations of the company was necessarily ultra vires. With respect, if one accepts Slade LJ's reasoning, it seems difficult to justify this rationalisation of Russell LJ's Judgment.

But beyond these objections to "the pedigree" of *Rolled Steel*, it is submitted that the reasoning in *Rolled Steel* is inconsistent with the well known House of Lord's decision in *Sinclair v Brougham* [1914] AC 398. Yet, this case does not appear to have been cited either at first instance or on appeal in *Rolled Steel*. In *Sinclair* a building society, to which the ordinary company law principles of ultra vires applied, had in its constituting rules an express power to borrow without limit. Its principal object was to operate the business of a building society. However, it undertook and maintained for over 50 years, along with its building society business, a general banking business for which it received deposits under its borrowing power. An argument that the banking business was not ultra vires was rejected at all three levels of decision. It was held to follow that all the contracts of deposits entered into for the purposes of the banking business were void and incapable of being ratified by the members of the society. The holdings in the case and the approach of the Lords to the appropriate relief to be given make it not possible to subject the case to the revision to which the Court in *Rolled Steel* subjected *Re Introductions* and *David Payne*. Further, since the building society ran both a building society business and the banking business it is not possible to distinguish the case in the way Slade LJ distinguished Russell LJ's Judgment in *Re Introductions*.

The doctrinal error which it is respectfully considered the Court of Appeal fell into in *Rolled Steel* was to assume that what is central to the ultra vires doctrine is the question whether a company has any power to perform the particular type of act in question and that it is generally not relevant to the question of vires to consider the purposes for which the power is actually exercised. In fact, this heterodox theory had earlier been advanced by C Baxter in "Ultra vires and Agency Untwined", [1970] CLJ 280. It is a theory based on a distinction central to the concept of an agent's authority; namely, that between whether an agent possesses the relevant power at all and whether the agent has misused the powers for improper purposes. However, it is submitted that the agency concepts have no relevance to the question of a corporation's vires which are determined principally by the objects or purposes for which the corporation was formed. The misapplication of the agency concepts to company vires has the perverse effect of reversing the relative importance of objects and powers which had been consistently stressed since the leading ultra vires case of *Ashbury Railway Carriage and Iron Co Ltd v Riche* (1875) LR 7 HL 653. In particular, it is worth repeating the oft-cited words of Lord Wrenbury (formerly Buckley LJ, a paragon of company law) in *Cotman v Brougham* [1918] AC 514, 522-523:

> My Lords, I cannot doubt that when the Act says that the memorandum must "state the objects" the meaning is that it must specify the objects, that it

> must delimit and identify the objects in such plain and unambiguous manner as that the reader can identify the field of industry within which the corporate activities are to be confined . . . the objects of the company and the powers of the company to be exercised in effecting the objects are different things. Powers are not required to be, and ought not to be, specified in the memorandum. The Act intended that the company, if it be a trading company, should by its memorandum define the trade, not that it should specify the various acts which it should be within the power of the company to do in carrying on the trade. . . . There has grown up a pernicious practice of registering memoranda of association which, under the clause relating to objects, contain paragraph after paragraph not specifying or delimiting the proposed trade or purpose, but confusing power with purpose and indicating every class of act which the corporation is to have power to do. (See also *Egyptian Salt and Soda Co v Port Said Salt Association Ltd* [1931] AC 677, JCFC.)

Lord Wrenbury went on to hold that an independent objects clause in a memorandum has the effect of permitting what might otherwise be mere powers to be ends or objects in themselves. Unfortunately, the Court in *Rolled Steel* did not give effect to the independent objects clause in Rolled Steel's memorandum, but appears to have preferred to reach the conclusion that the contracts in question were not ultra vires through a novel reformulation of the ultra vires doctrine itself.

An unhelpful decision

It is a widely held view, witnessed by the attempts at law reform, that it is desirable to minimise the impact of the memorandum on outsiders. Whatever the Court's aim in *Rolled Steel*, it is respectfully suggested that the decision is of limited practical assistance in protecting outsiders from the vagaries of the memorandum. After *Rolled Steel* the precise construction and application of the memorandum still determine the scope of the powers of directors, even if it is no longer necessary for the purposes of the company's vires to search further than to see whether the memorandum contains an express power to enter into a contract of any particular kind. Consequently in *Rolled Steel* it was held that non-compliance with the memorandum still rendered void the guarantee and debenture. It is also clear from the case that the relevance of whether the outsider knows of the exercise of a power for a purpose not authorised by the memorandum remains the same after *Rolled Steel* as it was to the application of the ultra vires doctrine as it was understood before *Rolled Steel*.

It is submitted that the new formulation with the same result is, moreover, not conceptually more satisfying. Mr Baxter ([1970] CLJ at p 280) suggests that the old rule was "absurd" in making the question of the effect of a company's vires on a transaction depend on the knowledge of the other party of the company's intention in entering into the transaction. Yet, although the common law adopts a functional and not a uniform approach to the various factors vitiating contracts, the common law rules relating to contracts affected by illegality provide a close parallel[4] to ultra vires contracts. At common law, where a contract is entered into in order to promote the execution of an illegal object, whether or not the contract is void ab initio or becomes unenforceable does often depend upon whether the party wishing to enforce it knew of the other party's illegal aims at the time, in the former case, of formation of the contract and in the latter, before performing its obligations under it. (See *Mason v Clarke* [1955] AC 778, and, generally, *Chitty on Contracts* (25 ed) para 1036-1041).

There is one possible advantage in the *Rolled Steel* reformulation. The misuse of powers for unauthorised objects may now be ratifiable by shareholders, which was clearly not the case as the law was understood before *Rolled Steel*. However, again unhelpfully, the Court left open the question of whether such an abuse of power was ratifiable.

A Misguided Decision

Not only does *Rolled Steel* not help to minimise the impact of the memorandum, it also adds, it is considered, additional complexities to the questions of corporate capacity and directors' powers, of which the following may not be exhaustive:

(a) The Independent Objects Clause: The decision detracts from the efficacy of independent objects clauses, since the Court felt unable to apply the relevant clause to the power to guarantee which was in a form still in widespread existence in New Zealand. The Court construed the power as only being exercisable for the purposes of the company's business. This reverses the general trend, recently promoted in *Re Horsley & Weight Ltd* [1982] Ch 442, to give effect to independent objects clauses even where the business of the company would not be promoted. Although there are duties imposed on directors under the general law to act for the benefit of the company[5] and, arguably, in some circumstances for the benefit of its creditors[6] as well as to act for proper purposes, the Court of Appeal in *Horsley & Weight* ([1982] Ch 442, 453-454 per Buckley LJ) indicated that if an independent objects clause permits the company to exercise the power for non-business purposes, then prima facie directors too can exercise those powers for those purposes.

More particularly, the construction of the power to guarantee in *Rolled Steel* has serious repercussions in those relatively common circumstances where one company in a group of companies raises finance for the group with the other companies in the group giving to the lenders guarantees of the borrowing.

In many cases it is not envisaged that every company in the group will necessarily benefit from the borrowings. Before *Rolled Steel* practitioners had been regularly placing reliance on the presence of independent objects clauses in memoranda of guaranteeing subsidiaries in these circumstances. This may not be a safe practice after *Rolled Steel*;

(b) Ratification: The Court in *Rolled Steel* raised, but did not answer, the question whether the exercise by directors of powers for purposes outside those stated in the

memorandum could be ratified by shareholders. In general, the exercise by directors of powers for improper purposes can be ratified by a majority of shareholders voting in general meeting (*Bamford v Bamford* [1970] Ch 212). Yet, the Court in *Rolled Steel* was not prepared to decide whether shareholders could ratify an exercise of powers by directors for purposes outside the memorandum. Slade LJ (at [1985] 3 All ER 52, 86-87) clearly favoured the view that shareholders acting unanimously could ratify such a breach of directors' duties. Browne-Wilkinson LJ (at [1985] 3 All ER 52, 94), however, expressly left the question fully open. The resulting uncertainty is further compounded by the fact that Slade LJ referred only to ratification by shareholders acting unanimously, whereas the general rule is that only a majority of shareholders in general meeting is needed to ratify a breach of directors' duties, a point raised also by L S Sealy [1985] CLJ 364. Slade LJ's reference to unanimous assent may, perhaps, be explained on the ground that BSC was relying in argument in the case only on those authorities which hold that a company is bound when its shareholders act informally but unanimously, since on the facts of *Rolled Steel* it was clear that no general meeting to consider the relevant transaction had ever taken place.

On the other hand, the need for unanimous assent to be obtained may, just possibly, have been intended by Slade LJ to preserve the rights of an individual shareholder to restrain a transaction which has been entered into for purposes outside those permitted in the memorandum, even if the transaction can no longer be considered ultra vires. This too may have been what Browne-Wilkinson LJ had in mind when he referred to the transaction as being "an excess or abuse of powers of the *company*" ([1985] 1 All ER 94) rather than an excess or abuse of the powers of the directors. But, if this is so, it seems little different in result to the distinction drawn by Vinelott J at first instance between ultra vires in the narrow and the wide senses, which the Court of Appeal wished to reject;

(c) Effect of breach of directors' powers: Slade LJ also held that the directors' misexercise of their powers meant that the guarantee and debenture were unauthorised and void. Again, this contrasts with what seems to be the accepted understanding of the general effect of a use by directors of powers for wrongful purposes; namely, that the transaction affected is only voidable and steps must be taken by the company to rescind the relevant transaction, if that step remains practicable.[7] The English and Australian cases on this point have been recently reviewed by Powell J in *Russell Kinsela Pty Ltd v Kinsela* ([1983] 2 NSWLR 453, 462-463, affirmed on appeal on different grounds in (1986) 4 ACLC 215).[8] It is not clear whether Browne-Wilkinson LJ also was of the view that the directors' exercise of powers was void;

(d) The residue of Ultra Vires: Other uncertainties arising out of the Judgments in *Rolled Steel* relate to the remaining extent of the revised doctrine of ultra vires. In particular, questions still remain as to first, the effect of express limits in a memorandum on the extent or purposes of relevant powers in the memorandum and, secondly, the effect of the misuse of powers which are only implied in a memorandum. As to the first of these matters, both Slade and Browne-Wilkinson LJJ opined that, by way of example, a power to borrow up to a stated limit would mean that any borrowing in excess of that limit would be ultra vires in the true sense (see also *Sadler v Auckland Co-operative Society Ltd* [1926] NZLR 84). On the other hand, they also opined that a power expressly qualified as exercisable only "for the purpose of the company's business" would not mean that any exercise outside that purpose would be ultra vires. Further, the Court must be taken to have held that the limited and ambiguous[9] power to guarantee in *Rolled Steel* itself was not broken (fortuitously, the guarantee was in fact accompanied by a loan from Colvilles to Rolled Steel and, therefore, clearly fell within the terms of the power).

As to the question whether the new understanding of ultra vires applies to implied powers, both Slade and Browne-Wilkinson LJJ seem to have carefully directed their judgments only to the situation where the power under scrutiny was one expressly stated in the memorandum. Nonetheless, one would hope that the position would be the same as for an express power, since there seems no reason to distinguish between express powers which may only be exercised for the purposes of the company's business and implied powers.

Conclusion

The evident conclusion is that the importance of the memorandum has been anything but diminished by *Rolled Steel*. It is respectfully suggested that, for the sake of company law, the liquidator of Rolled Steel might have been more appropriately satisfied without reliance on the memorandum. Thus, in establishing the liability of BSC and Colvilles, much the same result could have been achieved by the application of the principles that under the general law, directors must act for the benefit of the company and not for personal gain;[10] and, more controversially, directors must consider the interests of their company's creditors when the company is insolvent or it will become so as the result of the transaction under consideration.[11]

As far as the law of ultra vires is concerned, it seems to this writer that we need to reconsider the reforms of 1983, just as the Australians have done – twice![12] The English (see L S Sealy (1986) 7 Co Law 90) too are about to tackle the law of ultra vires, and some assistance may also be derived from there. □

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1 See G Shapira, "Ultra vires – Not Quite the End", [1985] NZLJ 12 4; R Burgess, "The Companies Amendment Act (No 2) 1983; Ultra vires – Buried but not quite the End", (1984) 11 NZULR 199; M W Russell, "The Companies Amendment Act 1983 (No 2)", [1984] NZLJ 132.

2 See for an example under the then equivalent Australian legislation *Hawkesbury Development Co Ltd v Landmark Finance Pty Ltd* [1969] 2 NSWR 782, where, however, the action failed on what was, arguably, only a technicality.

3 Because there was not a disinterested quorum of directors the Court held the transaction void because of the conflict of interest. Although, an Australian Court has reached a similar conclusion (*The People's Prudential Assurance Co v The Australian Federal Life and General Assurance Co Ltd* (1935) 35 SR (NSW) 253), two English

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Law and administration

By Professor K J Keith of Victoria University of Wellington

The article is the text of a lecture given to the administrative class at the Victoria University of Wellington by Professor Ken Keith. It was his last lecture before moving to the Law Commission. It has been left largely in its lecture form. Some references have been added by Professor Keith for those who want to pursue the matter further. In the article, Professor Keith looks at policy issue in relation to public law. He sees the major arguments as being about principle, institutions and processes. He considers the necessarily close relationships between Government and Law and between Politics and Law. Professor Keith argues that lawyers have a function and an obligation to take part in, the policy areas of the law as well as in matters of detail.

Today I shall look back over the last 20 or 30 years of developments in the relations between law and administration. I do this, not in nostalgia, but to try to find lessons for the future. I shall be very selective and so, with the Spanish-American philosopher George Santayana, I shall to some extent be looking over the crowd to see my friends.

How has the law developed? What kind of law and of lawyers do we need in dealing with public power? What will the role of the professional be? There are questions here for legal education as well which I will not pursue today except to note one emphasis that came through strongly at the seminar held at this University last October about careers for graduates. That emphasis, one in which leading employers shared, was on the thinking, adaptable graduate, on the individual who will be able to deal intelligently and sensibly with challenges which we cannot presently contemplate except in a very general way. Professor Richard Mulgan of the University of Otago, in (1986) Vol 99 No 796 *New Zealand Medical Journal* 107 also quoted in the *Report of the Victoria University of Wellington* for 1985, put the point this way: unreflective competence in today's techniques and today's relevant details will obviously be an investment of little long term value. You will find a similar emphasis in the faculty handbook statement of the qualities which we hope you will have when you leave us. You should go back to that statement – it draws on the best of the thinking in this faculty and in two North American ones, both closely connected in a variety of ways with this one.

For present purposes let me give you a shorter list, which like the handbook one, stresses *process* – the way things get done, the way we think, the way we work. . . . That is not to say that principle and purpose and knowledge of the law are not important. They are. But they are no use unless you can think about them and use them intelligently. Some of you may recall from your childhood the story about Petunia, the duck, who thought that to possess a book was to be wise. It was only after a minor disaster that she realised that the book could be opened, that there were words inside, and that they had to be read and understood if the book was to be of any use at all. You might apply the same lesson to the photocopier. The list is in no particular order –

1 Find the right question. Gertrude Stein, the novelist, was dying. She asked what is the answer? She apparently got none for after an awkward and prolonged silence she asked what is the question? And she died.

2 Get the facts. This will sometimes be difficult. They will sometimes be decisive. But you cannot gather them at random. You must be starting to get some kind of theory in your head as you are gathering them.

3 Accordingly search for the relevant principles.

4 Think of the changing context. Law is part of life. It is not something separate. Other disciplines will often be important. Much of your work in some areas will or should be with other professionals or should draw on their expertise.

5 Above all think. Use your reason.

> That involves using as well the available resources which are now becoming more and more important.

That obligation to think, to reason, is increasingly important. You have a great responsibility in the community. You are experts or soon will be seen to be in the doing of many important transactions and in the making and the operation of the institutions and principles and rules which control and affect much of our lives. Fuller, the great American jurisprudent, in Winston (ed), *the Principles of Social Order: Selected Essays of Lon L Fuller* (1981), coined the word eunomics – the science of good order and workable social arrangements. That is what he would see you doing as lawyers.

My five points, I said, were in no particular order. Sometimes the issue in front of you will be very much at large. It may be that in the end you think that there is not really a legal matter to give advice on. That in itself is important legal advice. It may be that the process of defining the real question will be the hardest part. Or it may be that you have a number of issues to identify and that determining the relationship between them is the difficult part. Think for instance about the organisation of the powers of the executive and the various controls to be included in an Immigration Bill. In such cases you may want to move backwards and forwards across a list like that I suggested.

When you become a Judge – as some of you will – you will find some of this relatively simpler, for the very process of litigation, the pleadings and the processes of proof

and argument will help organise the material for you; they should have answered Gertrude Stein's second question for you, at least in the context of the case – although the extent of the assistance depends on how well your colleagues have done that preparatory work, and you will still have the burden of judgment and decision. I don't, by those comments, want to denigrate that judicial task. Great Judges have made great contributions to the law and especially in public law and particularly in the last 20 or 30 years – although of course not just then. Think of Coke in the seventeenth century and Camden, Mansfield, and Holt in the next! You will indeed soon read, if you have not already, one of the greatest judgments ever written by a common law Judge – Lord Reid's in *Ridge v Baldwin* [1964] AC 40, given 23 years ago on the right to be heard.

Today however I want to say rather less of Judges and rather more about the executive and legislative contribution to our public law in recent years. It is important to keep the balance and not to think that administrative law is solely about the Courts splendidly standing in the way of the bureaucratic juggernaut. Governments are entitled to good legal advice as well. Governments must be provided with the legal tools to do the jobs we, as citizens, want them to do. And in any event there are other New Zealand surveys of the judicial contribution.[2] To return to a metaphor I have borrowed before, I will be talking rather more of the lawyer as physiologist and only a little of the lawyer as pathologist. (My first recollection of the use of the metaphor is by David Mullan, once a student in and member of this faculty, in a set of administrative materials prepared with Hudson Janisch, for use at Dalhousie University.)

The physiologist has to have regard to the wider environment. Let me sketch some parts of that, with particular attention to the changes in it occurring in the last 30 years. The changes present greater and greater challenges to the law and to lawyers. Think of the role of law and lawyers as I run through this list.

1 *The world* – consider the terrifying development of weapons of mass destruction; or the major political changes – compare the position of China or Japan or Germany 30 or 40 years ago; or the forces of decolonisation – United Nations membership has tripled in only 30 years; or great changes in trade patterns; or in alliance relationships; you might consider them generally or as they affect New Zealand.

2 *The role of government* – The Danks Committee, the Committee on Official Information, spoke of a special feature of New Zealand in arguing what it saw as the compelling case for more openness in government –

> The Government has a pervasive involvement in our every day national life. This involvement is not only felt, but is also sought, by New Zealanders, who have tended to view successive governments as their agents, and have expected them to act as such. The Government is a principal agency in deploying the resources required to undertake many large scale projects, and there is considerable pressure on it to sustain its role as a major developer, particularly as an alternative to overseas ownership and control. No less striking is the extent to which Government is involved in economic direction, regulation, and intervention. Along with the impact of the State budget and expenditures, there are important controls on, for example, wages, prices, the use of labour, transport, banking, and overseas investment. Our social support systems also rely heavily on central government. History and circumstances give New Zealanders special reason for wanting to know what their government is doing and why. (Committee on Official Information, *Towards Open Government, General Report* (1981) 14.)

One measure of the involvement and the change is that in 20 years social service payments (including education) doubled as a proportion of gross domestic product and by the end of the 1970s were 25%.

3 *Technology* – I have mentioned weapons of mass destruction. Consider as well communications with all their advantages as well as their threat to privacy and to other important values; or biological science including genetic engineering.

4 *Social change* – In New Zealand consider the state of race relations or the changing role of women; the lessening of traditional restraints; the growth of art.

5 *The sense of a separate nationhood* – There is now a much more conscious effort to work out destiny as a new nation in a much more challenging and complex world. The legislature has long recognised this; and the Courts increasingly do as well.[3]

6 *Interdependence* – There is now a much clearer perception of the vulnerability of the human race, of the need to avoid the scourge of war, of the need to develop and use methods of peaceful settlement of disputes, of the need to use exhaustible resources with care and to protect the environment, and to facilitate co-operation in many fields between states. (Consider the item on the agenda of the United Nations International Law Commission for which Professor Quentin-Baxter was responsible, International Liability for Injurious Consequences arising out of Acts not Prohibited by International Law.) I say perception. I do not say that action has always followed that perception. It obviously has not in important cases. And there is the fateful question – will human intellect prevail over our capacity for destruction? Here I might be a little more explicit about the role of lawyers and law. Consider in respect of terrorism the relevant treaties, the legislation which gives them effect, the negotiations about the Rainbow Warrior, the trial in that case, and the broader initiative in which New Zealand participates in the UN on terrorism. (eg, Aviation Crimes Act 1972 and Crimes (Internationally Protected Persons and Hostages) Act 1980, and Palmer, "Terrorism – can international co-operation meet the challenge?" (1986) Vol 11, No 3 *New Zealand International Review* 27.) Several of your predecessors are immediately involved in those activities. That is so too of the various actions relating to nuclear testing, such as the South Pacific Nuclear Free Zone, the legislation to give effect to that and to the government's policy, and the negotiations with the other governments involved. Or in respect of trade consider the momentous Closer Economic Relations Agreement with Australia.

That last point in my list calls attention to the point made by

Professor Quentin-Baxter in his outstanding 1984 public lecture, "Themes of Constitutional Development: the need for a favourable climate of decision" (1985) 15 VUWLR 12, abridged version in [1984] NZLJ 203, that we now, when thinking about public power, have to have in mind three different sources of institutions, principles and processes that bear on that power – law strictly so called (to revert to Dicey), conventions and other non-justiciable principles, and new and increasingly international standards. The last are more and more pervasive. I wonder, for instance, whether the legal profession has yet taken on board the great significance of action of the government in 1978 of ratifying the International Covenants on human rights.

The environment is one then that presents major challenges and changes. It is important that we attempt in the midst of all this to hold on to those things that are enduring and valuable. Our inheritance both generally and as lawyers has important features which protect values we cherish. How are we, as lawyers, to mediate continuity and change, heritage and heresy? (See eg Paul Freund, citing Alfred North Whitehead, on the parallels between art and law, *On Law and Justice* (1968) 22.)

I should now become more specific and select from the great range of issues relating to the power of the state – from such questions as:

- whether power should be conferred in the first place
- whether if held it should be no longer
- by whom, how, and subject to what criteria it should be exercised
- with what accountability, review and appeal.

My starting points in time, like my selection of topics, have to be a little arbitrary. The 1960 and 1984 election manifestos of the opposition parties are as good a starting point as any, and there is no harm in the fact that the relevant parts were written by lawyers with close connections with this faculty.

In 1960 the National Party included three proposals relating to the rights of the individual faced with the power of the state, proposals which are still prominent –

- a citizens' grievance authority – later to be carried into the statute book as the Ombudsman
- safeguards against the abuse of regulation making power – a matter to which I will return
- a bill of rights.

The 1984 open government policy of the Labour Party is fuller, showing a growth in concern about the power of the state since 1960, and also, I think, a greater professionalism in these areas. I will refer to some of that policy as well.

Lawyers have been in the middle of these developments – as politicians (both Ministers and parliamentarians), as advisers to the politicians, as witnesses before the parliamentary committees considering the proposals, as counsel, and as Judges. They are involved in arguing and deciding both the *is* and the *ought* – what the law is now and what it *ought* to be.

There is a neat example of that duality right from the beginning of the period I am considering – in 1961 and 1962 the Solicitor-General, Mr H R C Wild QC, was arguing for the maintenance of an extensive Crown privilege against the production of evidence on two fronts, the Cabinet Committee on legislation and the Court of Appeal (in the latter with the assistance and the opposition of counsel who were later to be Deans of this faculty). He lost in both[4]. That was uncommon for Sir Richard (exactly 50 years ago he was in the undefeated New Zealand University rugby team which toured Japan, and for the most part his life went on like that). The *ought* argument related to the preparation of the Ombudsman legislation. The officials – in addition to Mr Wild, Mr D A S Ward, Chief Law Draftsman, and Dr J L Robson, the Secretary for Justice – differed over three matters – whether ministers should be caught by the legislation, whether Crown privilege should be curtailed, and whether the procedure should be adversary or investigatory. Ministers were excluded (although recommendations made to them were included and they are now fully covered by the official information legislation) – Mr Wild and Mr Ward won on that, but they lost on the procedure to be followed (except for the important requirement that a hearing be given to anyone who might be criticised in a report) and on Crown privilege. The Court of Appeal also held in the direction of greater openness and concluded that the Judges and not Ministers should in general decide whether a particular piece of information held by the Crown should be released for the purposes of trial. It would be for the Judges to weigh the competing public interests in having relevant evidence available for the trial and in protecting it from disclosure. The reported arguments of counsel and the Judges are no doubt very like those used in the Cabinet Committee which Dr Robson tells us included an all day Sunday meeting on 1 April 1962.

The ombudsman legislation provides in a variety of ways for the opening up of government processes; the overstayer controversy in 1976-1978 provides an interesting example of it in operation[5]. The same trend can be seen in a different context less than a year after that Sunday meeting which debated the ombudsman legislation when Lord Reid delivered his great Judgment in *Ridge v Baldwin* requiring disclosure of information to the individual affected before certain powers are exercised to the individual's detriment.

Let me move on to the more general step towards open government that the Danks Committee proposed and parliament took by passing the Official Information Act in 1982. Let me again try to relate Court action and political action – both Judges and politicians reacting in similar ways to changing judgments about the felt necessities of the time.

Once again the major arguments were about principle, institutions, and processes. It was possible for the committee to propose and for Parliament to take much larger steps than the Courts – both in terms of establishing the new principle – that information is to be made available unless there is good reason to the contrary – and in establishing the detail of the reasons and even more of the process and the institutions to be used and to be followed.

But the Courts did also move in the early 1980s in a two way relationship with the legislative steps. Thus when the Court of Appeal in 1981 for the first time received a cabinet paper in the context of a public interest immunity argument the Danks Committee (including the cabinet secretary) had already reported that there was nothing

special about cabinet papers; there was no reason to give them particular protection *(EDS v South Pacific Aluminium (No. 2)* [1981] 1 NZLR 153, and the *Towards Open Government General Report* (1981), 19-20). Second, the committee was able in its supplementary report to take account of that case in proposing a technical change to the provisions about the discovery of Crown documents. (Committee on Official Information, *Towards Open Government, Supplementary Report* (1981) 13-14, and Crown Proceedings Amendment Act 1982, s 2 (amending s 27 of the principal Act.) Third and most significant for the relationship between the Court and legislature, the Court of Appeal has thought itself able to move the balance of the common law of public interest immunity in a more liberal direction than in England because of the different public policy it sees in the 1982 Act and in the Danks report. *(Fletcher Timber Ltd v Attorney-General* [1984] 1 NZLR 290 and *Brightwell v ACC* [1985] 1 NZLR 132.) It has done that although that legislation has itself nothing directly to do with the general law of public interest immunity. Could I generalise a little from these events of 1961-2 and 1981-2? This involves some repetition.

The first point is that at both times there was a general perception of a need for greater control over public power in particular by greater openness. The openness was for limited purposes in the litigation, and for wider ones in the legislation including democratic participation and accountability as the 1982 Act makes clear. It is sometimes said that the Judges have moved into a vacuum in recent decades in public law cases. I would suggest on the contrary that both the Judges and the politicians along with their advisers were moving in similar ways at much the same time. Part of the context of that movement was international, as appears from Dr Robson's account of his relationships with his Ministers of the late 1950s and 1960s, Mr H G R Mason and Mr J R Hanan, and in a less personal way in the reports of the Danks committee. UN discussions, the Scandinavian experience, and the freedom of information developments in Australia, Canada (especially Ontario), and the United Kingdom were all drawn on. But a large part of the context was very much indigenous.

The second generalisation is that the arguments in both the litigation and the political processes had much in common although there is always of course a question about how far the Courts can and should go in developing the law. This has been spectacularly illustrated in Australia in the last few weeks. The NSW Court of Appeal under the leadership of Kirby P – until recently the Chairman of the Australian Law Reform Commission – held that the Public Service Board was obliged to give reasons in rejecting a promotion appeal. His judgment draws on a great range of material, including for instance the New Zealand Official Information Act and the federal freedom of information legislation both of which impose an obligation to give reasons – for good reason as we have earlier discussed. But the High Court of Australia was not impressed by this law reform effort. On 21 February it held that the principles of natural justice imposed no such obligation. There was no precedent for it *(Public Service Board of New South Wales v Osmond* (1986) 63 ALR 559 reversing [1985] 3 NZWLR 447. For the use by the Judges in the *Corbett* case, n 4 above, of policy arguments see (1963) 1 NZULR 124, 132-133.

The third generalisation is that the relationship between the Court and the political process can be a collaborative and cooperative one. In particular cases the relationship is of course potentially confrontational or actually so. That is the very nature of litigation which challenges a particular governmental act. But in the broader sense the Courts must be drawing on legitimate public policy – even if it is not that of the immediate decision maker. The policy is to be found in the legislation enacted by the representatives of the people and in established and tested principle. I realise that what I have just said would be rejected by those who deny the existence of any broadly agreed principles of that kind. I think that in certain areas they can be found. That is what the Bill of Rights exercise is in part about. It can also be seen in the recent Court of Appeal decisions on public interest immunity I mentioned, and in the work of the Public and Administrative Law Reform Committee on such matters as powers of entry and search and seizure, or the procedures of tribunals.[6] Such work should be intensified.

Those generalisations could be tested in a variety of areas. I take just one – regulations.

The power of the government to make law by regulation has been the subject of controversy at various times for instance in the 1930s and notably at the political level after the end of the second world war. I begin later with the Judgment of Turner J in *Reade v Smith* in 1959 – the case about the school boy whose parents jibbed at his being directed to a fourth school in as many years. The direction was given under a regulation which was held invalid because it was inconsistent with the principle of free choice of school which the Court found to be in the Education Act. Turner J employed strong constitutional rhetoric –

> In a time in which the individual citizen is every day confronted with some new legislation by regulation, it is imperatively necessary [note the emphatic duplication] for the Courts to retain and to exercise the salutary jurisdiction which enables them to protect the liberty of the subject . . .

And later he was very critical of one of the provisions the Education Board invoked – the legislature appeared to have surrendered the law making powers of the people reposed in it to the executive, with a blank cheque and an advance ratification – but the Court would read down so far as it could the apparent self abnegation, [1959] NZLR 996, 1002, 1003-1004.

That case contributed to something of a public debate and perhaps to the 1960 National Party platform that I mentioned earlier.

The new government took three relevant steps –

1 It directed a change in the drafting of the empowering clauses in Acts so that they were narrower and objective in their wording. This would enhance the power of the Courts on review. This direction has in fact been followed in almost every statute since the exceptions can usually be seen as deliberate. In this area a principle can be seen at work across the whole statute book – or at least that part of it enacted since 1961 or 1962. As I said it is important that the statute book be seen, when that is

appropriate, as a co-ordinated statement and not as a wilderness of single instances, incorporating purely adventitious political decisions. This is an instance of that.

2 It established a parliamentary committee under the chairmanship of the Speaker, Sir Ronald Algie (one of the critics of the 1930s), to review the parliamentary supervision of regulation making. Its report – in some ways complacent one – led to a general requirement that all regulations be tabled in the House of Representatives and set up a procedure for the examination of regulations by the Statutes Revision Committee. The committee did not recommend that a special regulations committee of the kind found in other Commonwealth countries be established, or that regulations be automatically referred to a committee. *(Report of the Committee on Delegated Legislation (1962))*

3 The provision which Turner J criticised was repealed in 1963. Turner J later referred to this as an example of law reform in response to judicial criticism. It is interesting that he did not refer to the other two steps which were much more significant (Education Amendment Act 1963, s 16(1), and Turner, "Changing the Law" (1969) 3 NZULR 404, 406).

For about 10 years the new standing order provisions were largely ignored. But then for a number of reasons attention started to mount. A principal reason was the extraordinary use made from 1971 onwards by governments of both major parties of the powers conferred by the Economic Stabilisation Act 1948. Government by regulation became a political issue. Litigation relating to the wage and price freeze also helped. The Statutes Revision Committee also undertook a number of useful inquiries. And even earlier the initiative and research of members of this faculty had helped bring the potential of the standing orders to some prominence.[7]

Let me begin with the Courts, move to the Statutes Revision Committee, and then refer to the wider political scene.

The Courts identified two different kinds of possible grounds of attack on the wage and price regulations made under the Economic Stabilisation Act 1948.[8] The first essentially required the Courts to decide that the regulations were not reasonably capable of being related to the economic stability of New Zealand. It is understandable that no Court has been willing to come to that harsh judgment of the government – although the Court of Appeal did reject such an argument by only 3 to 2 in one case. Some of the rhetoric in these cases is interesting. Let me take just one piece from Turner P in the first of the economic stabilisation cases to come before the Court of Appeal – *New Zealand Shop Employees Union v Attorney-General* [1976] 2 NZLR 521. The regulation imposed limits on the powers of the Arbitration Court. What of such limits on the powers of the regular Courts . . .? This argument plainly concerned the Court, especially given our constitutional arrangements. Turner P listed them –

- we have only one House in our Parliament
- there is no second Chamber to impose a check on it
- the Governor-General in the usual case does what he is advised by his Ministry
- that Ministry has a majority in the single House

But he then stressed the width of the purpose stated in the 1948 Act – the promotion of the economic stability of New Zealand, the subjective language used in the empowering provision (a contrast here with his narrow reading of such language in *Reade v Smith),* and the open texture of the Act as a whole. Moreover, legislation by regulation has become, he said, a favoured method of implementing government policy alike in dictatorships and free democracies. Within the second category of argument, the Courts did impose or suggest some control, but very much at the margin, by reference to constitutional principle – that regulations cannot in general derogate from statutes and that the right to go to Court cannot in general be abrogated. In that later reference there is even a suggestion of limits on the power of parliament itself.

More significant for future developments probably was the growing confidence of the Statutes Revision Committee which began to work out its procedures and a careful non partisan role. It was not, it said, in general concerned with policy, but there were things it could usefully do. Thus

- it re-emphasised the primacy of Parliament and questioned the provision in the Acts Interpretation Act which indirectly allowed regulations to derogate from Acts in some cases
- it stressed that the government should consult those immediately affected before exercising regulation making powers; the government announced that it had adopted that as a general practice and notice and consultation provisions started to appear in statutes concerned with such matters as safety standards, as well as others
- it expressed caution about tertiary legislation, made for instance by a permanent head of a department; for one thing it would escape the safeguards increasingly surrounding the making of regulations, and
- it proposed that licensing powers in regulations should be subject to procedural and other safeguards.[9]

This activity, plus the wider political concern about the use of regulations to deal with major economic policy, led to a reference late in 1983 of the general question of the parliamentary supervision over regulations to the Statutes Revision Committee.

I should pause at this point. What is the purpose of all this activity of the Courts and parliamentary committees? Doesn't the government have to govern? Mustn't it be concerned with the wage fixing process and with income levels, and with closely related matters such as prices? Does it really matter how it takes the steps it judges necessary and desirable? Doesn't it have the votes anyway?

Let me give part of the answer by mentioning three matters that happened at about the same time in 1983. The proposed increase in car registration fees, voted by Parliament the year before, had in the government's opinion to be reversed. The wage and price freeze was to be continued. And the government wished to borrow on the local market by way of KISS stock. The first decision required the recall of

parliament which was adjourned at the time, the passing of the necessary legislation in one day, and the assent to it by the Governor-General. The second was achieved by an order in council – that is the signing by the Governor-General of the proposed regulations on the advice of as few as two of his Ministers and with no public process. The last required no formal action at all – the matter did not have to go to the Governor-General in Council and therefore in practice to Cabinet. Weren't the processes in these cases upside down? Where are the processes for responsibility and accountability? Or the processes requiring the government to explain and justify itself?

One of Parliament's roles is to examine the policies of the government. One major way of doing that is to examine the government's bills incorporating those policies. That process also gives the wider public an opportunity to make submissions on those important matters – an opportunity which has been enhanced substantially in the last 15 or so years and which often leads to changes in legislation and sometimes its deferral. But the use of regulations or other government processes for deciding such matters means that the Parliament and the public are deprived of those opportunities. It was no doubt for such basic constitutional reasons that the Algie Committee said that Parliament through the Act should settle the principle and leave the detail to the regulations.

The most recent actions by both the government and the Parliament reflect these broad ideas of the role of Parliament. First the government has announced its intention to have repealed its wide powers under the Economic Stabilisation Act, the National Development Act and the Public Safety Conservation Act and its price control powers. Some of the relevant legislation is already in the House. Second, the Statutes Revision Committee in 1985 reporting on its 1983 reference produced a far ranging set of proposals which have been incorporated into the new Standing Orders. They establish a regulations review committee (which has an Opposition member in the chair), provide for the automatic reference of all regulations to the committee, state a wider set of grounds for review, and provide as well for an easily invoked grievance procedure.[10] And there are still further steps to come in strengthening parliamentary control. All of those steps, I would stress, are very much the result of legal principle, legal processes, and the work of lawyers – the principal sets of submissions were made by lawyers. And the new arrangements are now available to lawyers for the benefit of their clients. It will be for lawyers to develop them.

I have been discussing regulations. The letter s at the end of that word is significant. If I were to discuss the lawyer's role in relation to regulation and regulatory reform, my topic would be even larger. That would also be so if I were to consider, again by reference to law, legal and constitutional principle, and relevant international standards, our taxation system (eg McKay "Taxation and the Constitution" (1985) 15 VUWLR 53) or our system of public enterprise. I think that both law and lawyers are both critical to the proper statement, debate and resolution of questions such as those – matters which are very much on the public agenda at the moment. My message then is that law and lawyers – and that means you – must contribute not just to the detail of public law – although that is essential – but also to such larger matters. □

1 Eg *Prohibitions del Roy* (1607) 12 Co Rep 63; *Case of Proclamations* (1611) 11 Co Rep 74; *Entick v Carrington* (1765) 19 St Tr 1029; *Sommersett's case* (1772) 20 St Tr 1; *Ashby v White* (1704) 2 Ld Raym 938 (Holt C J dissenting; for the reversal by the House of Lords see 14 St Tr 695, 778).

2 See those of Sir Robin Cooke, "The Rights of Citizens" in Milne (ed), *Bureaucracy in New Zealand* (1957) 84, "The Changing Face of Administrative Law" (1960) 36 NZLJ 128, "Administrative Law : The Vanishing Sphinx" [1975] NZLJ 529, "Third Thoughts on Administrative Law" 1979 Recent Law 218, and his paper for the 1986 Legal Research Foundation seminar (to be published in a book edited by Michael Taggart); Aikman in Robson (ed), *New Zealand : The Development of its Law and Constitution* (2 ed 1967) Ch 4 Northey, "The Changing Face of Administrative Law" (1969) 3 NZULR 426; "A Decade of Change in Administrative Law" (1974) 6 NZULR 25; and Keith, "A Lawyer looks at Parliament" in Marshall (ed), *The Reform of Parliament* (1978), "Administrative Law Reform 1953-1978" (1978) 9 VUWLR 427, "Ridge v Baldwin 20 years on" (1983) 13 VUWLR 239, and "The Courts and the Constitution" (1985) 15 VUWLR 29.

3 For legislation see eg the list in Robson (ed), n 2 above, xv-xx, and that in the index to the *Oxford History of New Zealand* (1981), ed W H Oliver, 553, and for the judicial contribution, Robson (ed) n 2 above, and Cooke, "Divergences – England, Australia and New Zealand" [1983] NZLJ 297.

4 Parliamentary Commissioner (Ombudsman) Act 1962, s 17(2) and *Corbett v Social Security Commission* [1962] NZLR 878. For the Ombudsman story, I have drawn heavily on Dr Robson's very interesting account, *The Ombudsman in New Zealand,* Occasional Papers in Criminology No 11 (1979). See also Sir Richard Wild, Chief Justice (as he had by then become), "The Courts and the Ombudsman" *Conference of Australasian and Pacific Ombudsmen* (1974) 81.

5 For the overstayers' case see 1978 Annual Report of the Ombudsmen 9-10 (publication of criteria, information being made available to the Department and to the Minister). For the information role of the Ombudsman before the enactment of the Official Information Act 1982 see Shelton, "The Ombudsman and Information" (1982) 12 VUWLR 233.

6 *Statutory Powers of Entry,* Seventeenth Report of the Law Reform Committee (1983) and eg from 1983 the Meat Amendment Act, ss 2 and 3, the Electricity Amendment Act, s 4, the Films Act, s 69, and the Forests Amendment Act, s 6. For instances of Courts drawing on legislation for indications of policy see the cases cited in (1985) 15 VUWLR 29, 37-38.

7 Frame and McLuskie "Review of Regulations under Standing Orders" [1978] NZLJ 423 (in part on Mr Frame's role in the Rock Lobster case, n 9 below) and Shelton, Government, the Economy and the Constitution (1980 LLM Thesis, VUW).

8 *New Zealand Shop Employees Union* v *Attorney-General* [1976] 2 NZLR 521, CA; *Auckland City Corporation* v *Taylor* [1977] 2 NZLR 413; *Brader* v *Ministry of Transport* [1981] 1 NZLR 73, CA; *New Zealand Drivers Association* v *New Zealand Road Carriers* [1982] 1 NZLR 374, CA; and *Combined State Unions* v *State Services Co-ordinating Committee* [1982] 1 NZLR 742, CA.

9 See eg the reports of the Committee relating to the Rock Lobster regulations JHR 1977, pp 57-58; Remuneration (New Zealand Forest Products) regulations 1980 App JHR 15, p 6; and the Civil Aviation regulations 1980 App JHR 15, p 17.

10 See the First Report on Delegated Legislation of the Statutes Revision Committee, 1985 App JHR 15A, the First Report of the Standing Orders Committee (July 1985) para 3.9, and the Standing Orders which came into effect on 1 August 1985.

Self confidence

Men of no more than ordinary discernment never rate any person higher than he appears to rate himself. He seems doubtful himself, they say, whether he is perfectly fit for such a situation or such an office, and immediately give the preference to some impudent blockhead who entertains no doubt about his own qualifications.

— Adam Smith
Theory of Moral Sentiments (1759)

Hear The Other Side:

Extracts from the Autobiography of Dame Elizabeth Lane (I)

Dame Elizabeth Lane was born in August 1905 and educated both privately and at Malvern Girls College. After a comparatively youthful marriage in 1926, Dame Elizabeth's distinguished career in the Law began relatively late with her call to the Bar in 1940. From 1961-1962 she was Recorder of Derby and shortly afterwards she was appointed a County Court Judge. In 1965 she became the first female Judge of the High Court. Dame Elizabeth retired in 1979 and now lives in Winchester. Below we reproduce extracts from her autobiography Hear The Other Side *published 26 November 1985 by Butterworths and now available in New Zealand.*

First Briefs

As I had been called to the Bar by the time I became a pupil, I was theoretically qualified already to take any briefs which came my way. It was not too long before the first one did. It was a matrimonial case in a Magistrates' Court (then referred to as a Police Court). I took advice as to how to conduct it, but have virtually no recollection of it, save that it was all over in a few minutes, much to my relief. The next was a Rent Act case in a county court in which a landlord was seeking possession of his house from the tenant on the ground of nuisance. I was appearing for the tenant who was a police officer and to whom losing the case would have been a serious matter, apart from being made homeless.

To say that I was terrified out of my wits is no exaggeration. When the case ended I came out of court with the symptoms of shock. My face was chalk-white and I could remember nothing at all of what had taken place in court except for two matters: we had won and kind Judge Earengey had said during his judgment, "Mrs Lane very wisely refrained from pursuing that line of cross-examination". I was conscience-stricken at receiving the compliment because it had not occurred to me that such a line of cross-examination could be pursued: if it had, I should probably have pursued it.

Criticisms are sometimes made of the robes worn in court by judges and barristers. There are powerful and, to my mind, convincing reasons for retaining them which I will not canvas here, but I will add one of my own which is that it is an immense comfort to a nervous young practitioner to know that, however green and incompetent he may feel, at least he looks like a barrister.

Women at the Bar

In my early days at the Bar there were few women practising and even fewer with a good practice. There was still a certain amount of prejudice against women barristers, although the first of them had been called to the Bar as long ago as 1922. It was after the Sex Disqualification (Removal) Act of 1919 was passed that they were admitted as students of the Inns of Court and could be called to the Bar after passing the examinations. Gray's Inn had the distinction of being the first Inn of Court to call women to the Bar.

As part of the Call ceremony the Treasurer of the Inn makes a speech of welcome to the Barristers who have just been called. But on the occasion to which I refer the then Treasurer of Gray's Inn (long since dead) was not in sober mood and so far forgot himself as to say that women were quite unfitted for the Bar and added "The only time when the male intellect descends to that of the female is when the male is drunk". At which a voice from the back of the hall was heard to say "I see. Down to the she in sips"—a nice quip but I like to think that the Treasurer would have been surprised (not to say flabbergasted) to learn the facts that in the year 1984 of the 5,203 practising Barristers 641 would be women, that of the 545 practising Queen's Counsel 11 would be women and that there would be 15 Circuit judges and three High Court judges who were women.

I think that the early prejudice against women barristers was mainly on the part of the litigants rather than of solicitors. No solicitor was ever tactless enough to tell me that he had had difficulty in persuading a client to agree to a woman being briefed on his behalf but I have no doubt that this happened on occasions. Indeed, I know it did once when, after rather a good win in a difficult case, I received a somewhat left-handed compliment from the lay client who ended by saying, ". . . and I take back everything I said to the solicitor about having a woman barrister". On another occasion the opposite occurred when, as the solicitor told me, a man walked into his office and said, "Good morning—My name is so and so. I am charged with embezzlement. Can you get Mrs Lane to defend

me? If not I am going elsewhere".

When I first went on circuit the practical arrangements for women barristers were non-existent. At Assize Courts and Quarter Sessions Courts there was a men's robing-room, which I was expected to share. I did not endear myself to those in charge of the court buildings by agitating for separate accommodation. But in the end I succeeded except in one Quarter Sessions Court in Lincolnshire where lack of room made it imposible: there was just one large room in which counsel robed, solicitors left their hats and coats and police officers deposited their helmets. Very matey, but undignified.

There was also difficulty about a separate robing-room in some of the county courts in and around London. In one of them my persistence was rewarded by the exclusive use of a room on the door of which was a large notice "GAS-KEEP OUT".

Among male members of the Bar I met with no sign of resentment or any obvious feeling of masculine superiority. On the contrary, they were uniformly kind and as helpful to me as, traditionally, they are towards one another. A barrister in difficulty over some legal point can always go to another with greater or more specialised knowledge to ask for advice and, no matter how busy the latter may be, this is always forthcoming. Bearing in mind what one or two other women barristers have told me of their experiences, I think that I was very fortunate, lucky perhaps, in this regard.

As to the judges' attitude to a woman barrister almost without exception they were kind. The last thing one wanted was extra kindness because one was a woman but I did not feel that I received more than the usual consideration judges try to show to all beginners. Once I had become an established practitioner I think that I was treated in the same way as any other member of the Bar. There were two exceptions, two judges who made it painfully obvious that a woman's appearance before them was unwelcome. They are both dead now: there is no need to mention their names. There were judges who were more difficult to get on with than others, but male barristers also found them so.

Judicious Approach

With hindsight I regret that I did not preserve any of my dozens of bar notebooks, so I am largely dependent on my memory in trying to recall cases in which I was concerned. Sometimes I can recall the facts of cases without being sure whether I was in them or just sitting in court listening to them.

For example, the case of the resident gardener who worked fully clothed in a nudist colony. One night his clothes were burnt in a fire so he stole some of the nudists' clothes to cover his nakedness. And that of a youth who broke into a house one morning, was surprised, eluded his pursuers and hid himself in a wood. Hours later when he thought it was safe to do so he made his way to a road and thumbed a lift from a motorist. What he did not know until too late was that the driver was a police officer in plain clothes who had just come from making investigations at the house the youth had broken into, recognised him from the description he had received and drove him straight into the police station yard.

Other cases

There are other cases which stand out in my memory and in which I know I was concerned. One of these was in 1941 before the late Mr Justice Stable. I had to defend a man charged with obtaining board and lodging at a hospital by false pretences.

The facts which emerged were that the defendant was skilled in bandaging one of his arms or legs and having done so, lay down by a roadside towards evening until some kindly motorist stopped and, at his request, drove him to hospital. There he explained that earlier in the day he had been run into by a car. When the doctor wished to examine the injured limb he appeared to be very distressed, saying that the wound had been dressed by a doctor at his surgery earlier in the day and that as the injury had now stopped hurting, could it please be left until morning before the dressing was removed and an examination made. This had worked on previous occasions and early the following morning he had recovered his clothing and slipped out of the hospital. But this time the doctors were too quick for him and uncovered his uninjured limb.

Wearing my robes I saw my client in the cells on the morning of the trial. He was a white-haired, blue-eyed, apple-cheeked old darling to look at. Butter would not have melted in his mouth. He insisted on calling me "Sister" and the burden of his instructions was that he would have to plead guilty but would I please do my best to persuade the Judge not to send him to prison but to send him to a hostel. He kept on saying:

> Oh sister, I am such a silly old man. I am so sorry for what I have done. I'll never do it again. Please help me.

I swallowed this. It was not until I heard prosecuting counsel opening the case that I learned that he had committed the earlier similar offences. When his criminal record was read out, it included five cases of attempted suicide, at which the Judge remarked "Five! He cannot have been trying!" Of course he had not, this was another means of obtaining free board and lodging.

The sentence was 18 months' imprisonment whereat what I can only describe as an explosion occurred in the dock: there was a stream of invective against the Judge and it took four prison officers to overpower the man and take him down the dock steps, still shouting abuse. I was horrified and being still rather green feared that the Judge would somehow hold me to blame after my earnest expression of my client's repentance and desire to reform. I think that Mr Justice Stable observed my discomfiture for a few minutes later his clerk brought me a note (which I still have) inviting me to dine at The Judges' Lodgings—my first of those cherished invitations to a member of the junior Bar. Underneath the signature was written "I was much pained at the aspersions your lay client cast at my parents' memory. To the best of my belief they were untrue". This was the start of my enduring and affectionate admiration for Mr Justice Stable.

A blinking judge

Not many of the judges were given nicknames by the Bar but Mr Justice Stable was always known as "Owlie" because of his habit of blinking. He was well aware of this and certainly did not resent it. Much

later on I had letters from him in which he so signed himself. He was a very humane and shrewd criminal judge. As far as I know no book has ever been written recording the many true stories about him. It is not for me to attempt to remedy this but there are some anecdotes which I will recount.

A poacher, who had poached the same land for years, was startled one day to hear the sound of a gun at a time when no landowner or gamekeeper was likely to be shooting. Investigation revealed that it was a young, interloping poacher who had been firing. The old boy warned him very seriously not to do it again or he would "get both barrels". The young poacher did it again and got both barrels as he ran. It took the hospital a long time to extract all the shot from the backs of his legs. The old boy pleaded guilty to wounding. Mr Justice Stable, who was himself a landowner, obviously felt a certain sympathy for him and bound him over for two years on condition that he did not carry a gun during that period. Asked if he understood, the old boy said that he did, but when he was half-way down the dock steps Mr Justice Stable said, "Bring him back. He has not understood what I meant". Then, addressing him: "Listen to me. What I have said means that if, as I suppose, you intend to go on earning your living in the only way you know, for the next two years you will have to use *nets*".

Mr Justice Stable could be somewhat unconventional at times. I was once making my final speech in a civil action when his clerk came into court and whispered something to him. The Judge held up his hand and said, "One moment please. I have an announcement to make. By some horrible mischance the wrong horse has won the Derby". (He named the winner but I have forgotten it.)

In Silk

In 1958 I decided to apply for Silk. This is often a difficult decision to take and something of a gamble, although perhaps less so in recent times than it was in my day. There have been quite a number of successful juniors with large practices who have been failures as Queen's Counsel.

Before I made the decision I asked the advice of the late Mr Justice Geoffrey Lawrence who was then one of our ablest and most respected Silks. He advised that there were certain questions to ask oneself: "Am I doing the kind of case in which a leader would probably be briefed if I were not in it?" "Are my financial means such that I could manage if I did not succeed in Silk?" "Is there room for another Silk in my present Chambers, if not would I be prepared to move to others or to set up Chambers of my own?" The answers seemed to be "Yes" rather than "No", so my application to the Lord Chancellor was made. It failed.

In those days apparently the practice was to give Silk to a certain number of those who practised on each of the circuits. I did not know until later that another Midland circuiteer, senior to me in call and circuit membership had also applied and would be likely to succeed if there were only one more Silk to be appointed on our circuit—unless I was made a special case. As I had always maintained that a woman at the Bar should be treated in exactly the same way as men it was unreasonable of me to be piqued when my application failed, but I was. My ruffled feathers were somewhat smoothed when a High Court judge, not one of the two whom I had asked to be referees in support of my application, told me that he had said to the Lord Chancellor of the day that my not getting Silk was "a bloody shame".

In those days it was quite common for a first, or later, application to be turned down and everybody said that I must take the usual course and apply again in the following year. I did not do so, partly because of my unjustifiable pique and partly because I anticipated something of a bumper year ahead if I remained a junior. In 1960 I applied again and this time succeeded. I never regretted it.

I was by no means the first woman in Silk. In 1948 the first in Great Britain was that most able and charming member of the Scottish Bar Miss (now Dame) Margaret Kidd. In 1949 England had her first, two together, the late Mrs Helena Normanton and Miss Rose Heilbron (afterwards Mrs Justice Heilbron).

Having a good junior could be a great help. In a libel action in which I acted for the plaintiff there was no dispute that the document concerned was a most scurrilous libel, but the point at issue was its "publication". Libels written to the person libelled are not actionable provided that the writer does not communicate them to any one (apart from the writer's spouse) other than the recipient. My junior drew my attention to a particular authority which I had looked at and discarded as being insufficiently in point, but the enterprising junior (who is now a Circuit Judge) suggested a way in which use could be made of it which I gladly adopted as part of my argument. This being a libel action we exercised our right to have a jury at the trial. They found in our favour and fixed an appropriate amount of damages.

The unsuccessful defendant appealed. In the Court of Appeal Gerald Gardiner QC (afterwards Lord Gardiner and a Lord Chancellor) was briefed to lead for the appellant, a formidable advocate if ever there was one, but we managed to hold the judgment in favour of the plaintiff.

Chairman of a Mental Health Review Tribunal

My normal work at the Bar was not my only activity. Although who is and who is not going to get Silk is always supposed to be a closely-guarded secret, before the date when the new Silks were to be announced I had a very good idea that I should succeed. This was because in early March 1960 I was invited to become Chairman of one of the new Mental Health Review Tribunals to be set up under the Mental Health Act of 1959. It seemed to me that this was not an appointment which would be considered suitable for a member of the junior Bar. The country was divided into 15 areas. Birmingham, to which I was appointed, being the largest.

This was a new departure as I had never before been responsible for any organisation. The Chief Regional Officer of the Ministry of Health in Birmingham was Clerk to the Tribunal. He was exceedingly helpful and efficient members of his staff did much of the day-to-day work. I was allotted a room in the Ministry building, with a carpet and two telephones—status symbols I gathered. The Tribunal sat with a

minimum of three members, one from each of the three panels, legal, medical and lay. Additional members might sit if the Chairman so desired. A member of the legal panel presided. I did so myself unless I was unavoidably committed elsewhere. In some difficult cases I was glad to have the assistance of two or even three of the consultant psychiatrists who constituted the medical panel. The lay members were responsible people who had rendered public service of one kind or another.

In the area there were over 20 hospitals for the mentally ill or handicapped. The Tribunal sat at one or other of these hospitals. Our task was to hear applications for discharge by patients compulsorily detained or some other person with a qualifying interest, usually a close relative or spouse, on their behalf. The Tribunal could direct discharge or no discharge or alternatively direct reclassification of the patient. In the first year 55 applications were heard. Additionally there were separate meetings of the members of each panel.

Some of the applications were necessarily rather harrowing. Perhaps among the saddest were those of patients incapable of leading an independent life but who nevertheless could have been discharged if there had been members of their families able and willing to care for them.

As Chairman I could, and did, ask to see round some of the hospitals. This provided some interesting experiences; for example walking with the Superintendent round the garden of a hospital for the mentally handicapped when a brick came hurtling over a hedge and narrowly missed us. I took rather a poor view of this, but although the assailant was hidden by the hedge, the Superintendent smiled deprecatingly and said, "Oh, that's George. He does things like that".

Quite often on my visits I was struck by the understanding and patient care of some of the nurses and the teachers of the subnormal. At one hospital for the mentally handicapped I saw boys and young men who, to the eye of an untrained observer, looked to be incapable of learning or doing anything, yet they were performing quite complicated tasks in a workshop and their pride in displaying their skills was wonderful to behold. Their instructor was obviously a most dedicated and remarkable man for whom one felt a profound admiration.

Recorder of Derby

At the end of 1961 I was appointed Recorder of Derby. I was not the first woman to hold such an appointment: Rose Heilbron became Recorder of Burnley in 1956.

A Recordership is an ancient and honourable office. The Lord Mayor or Mayor is always the first citizen of a city or borough, the Recorder the second. Both of them were required to be in attendance upon any visiting Royalty. If one appeared as counsel at the Assizes in the county where one was a Recorder one was not addressed by name by the judge but as "Mr Recorder".

Although I was then no longer a Recorder I was very sad when Quarter Sessions were abolished by the Courts Act of 1971. We still have Recorders but they are no longer Recorders of any particular place and sit in a Crown Court here, there and everywhere. Administratively this may be desirable or even necessary but in my view a Recorder who got to know his people, his probation officers and his police, and was known by them, was in an advantageous position to administer justice locally.

The previous Recorder had held office for 28 years and had had the reputation of never sending anyone to prison or, if he did, only for a very short term. Any serious crimes committed in the borough were, if possible, sent for trial at Assizes.

Fortunately Derby was a fairly law-abiding community. Partly, I think, this desirable situation was due to the good relationship between police and populace. This relationship was fostered in different ways: for example, at regular intervals police motor-cyclists gave up their free evening time to give instruction in the maintenance and repair of motor cycles. Advantage was taken of this by young men who would attend auction sales at which they could pick up broken-down motor cycles very cheaply, push them, sometimes for many miles, to Derby police station where they were helped to put the machines into safe working order.

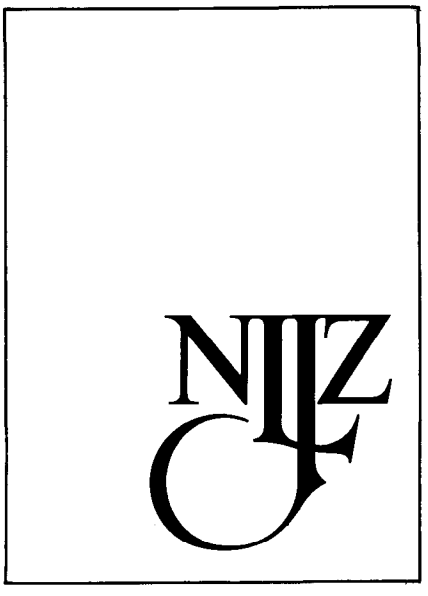
Another event which encouraged the relationship was the annual police garden party. There was an open invitation to everyone in the town to attend and many did so. They were regaled with tea and buns and got to know their local officers.

In some cases I was struck by how much help the Derby people gave the police. If an officer was in difficulty he could be pretty sure that people would come to his aid. If there was a noise in the night of breaking glass from a neighbour's house the police would be sent for but men of the neighbourhood might well be prepared to turn out and surround the house even before the police arrived.

There was one particular officer in the force whose brother was a probation officer. Between them they managed to keep a number of youngsters out of trouble.

Perhaps it was not only the very much smaller population which caused the Derby Quarter Sessions Calendars to be so much lighter than those of the Manchester and Birmingham. On the four occasions when I sat at Derby the Sessions only lasted for two or three days.

As I was already spending rather more time on other activities than was good for my practice, once I had my own Recordership I ceased to sit at Birmingham Quarter Sessions. One acquires a certain amount of kudos from holding appointments but what solicitors require is that one should be available for court work, not away for substantial periods on other duties. Looking back at my fee book I am surprised that I had so many cases as I did when I was in Silk. □



Books

The Surveyor and the Law

Edited by J A McRae with 19 authors

Published by the NZ Institute of Surveyors in 2 vols looseleaf. Price $115, available only from NZ Institute of Surveyors

Reviewed by E K Phillips, formerly Registrar-General of Land

Recent years have seen a significant advance in the volume and complexity of the law dealing with the subdivision and development of land. The Local Government Act 1974 as amended by the Local Government Act 1978 rendered out of date the few authoritative textbooks previously published on the subject. The New Zealand Institute of Surveyors sought firstly some sort of textbook authority for the Bachelor of Surveying Degree Course at Otago University, and secondly a practical guide to the law for its members in the operation of their profession.

Originally the Institute had published in 1937 a small but valuable handbook written by E M Kelly entitled *Law Relating to Land Surveying in New Zealand.* This ran to four editions in an attempt to cover constantly changing legislation. The 4th edition, which appeared in 1971, was enlarged and revised by B H Davis, but is now out of print and is definitely out of date. Legal textbooks and manuals were scarcely more helpful in providing a current authority or a precedent for the work in hand.

Confronted with this situation the Institute of Surveyors, under the editorship of Associate Professor J A (Lex) McRae of the Department of Surveying, Otago University, have published a textbook and manual consisting of two volumes in looseleaf form to facilitate additions and amendments which, of course, are inevitable.

This book, entitled *The Surveyor & the Law,* is divided into 15 chapters which deal with the following topics:

1 Introduction to Law
2 Local Government in New Zealand
3 Title to Land
4 The History of the New Zealand Survey System
5 Boundaries
6 Subdivision of Land
7 Town and Country Planning
8 Roads
9 Taking Land for Public Works
10 Land Settlement
11 Mining
12 Maori Land
13 Engineering Contract Law
14 Administration of Surveying Profession
15 Riparian and Water Rights

Looking at the publication as an addition to a law library, the chapters which are of great value to a conveyancer are those on Local Government in New Zealand, Title to Land, Boundaries, Subdivision of Land, Town and Country Planning, Roads, Taking Land for Public Works, Land Settlement, Mining, Maori Land and Riparian and Water Rights. The editor is supported by an imposing list of 19 compilers and indeed, to my mind, the great value of the manual exists in the careful and orderly presentation of material which has been gained from other sources of publication.

The editor and the compilers on such subjects as; Title to Land, Boundaries, Subdivision to Land, Maori Land, Mining and Riparian and Water Rights, have succeeded in assembling a breadth of material which I have not seen available from any other source.

Their approach is essentially practical rather than academic and this has resulted in the methodical presentation of the information and precedents to which are required in actual practice. This is not to say that the principles of the law involved have been neglected but the emphasis of the book is practical rather than academic. The chapter on Local Government in New Zealand warrants special mention. In my opinion it is the best presented analysis of this difficult Act I have seen.

The book is exceptionally well documented — it quotes source, references, reference to reported cases and sections of Acts extensively, losing nothing in this regard if compared to publications prepared for the legal profession. Most practitioners at one time or another have regretted the lack of a direct answer to the problem they are confronted with, or a suitable precedent. This charge cannot be levelled at the present publication. From the lawyer's viewpoint I was particularly impressed with the handling of the topics of:

Adverse Possession as Evidence of Title
The Need for Plans Under the Land Transfer Act
Boundaries
Fences and Walls
The Fencing Act 1978
Natural Water Boundaries
Accretion and Erosion
Strata and Unit Ownership
Flat Ownership
Appearances Before Council Under the Town and Country Planning Act 1977
Road Stopping and Using
Legality of Roads
Acquisition of Land for Public Works
The Land Settlement Promotion and Land Acquisition Act 1962
Land Settlement Under the Local Government Act 1974
Vesting of Roads, Streets, Accessways and Service Lanes Easements
The Mining Act 1971
Dealings with Maori Land
Riparian and Water Rights

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New rules on advertising (II): Do the New Zealand Law Society rules go far enough?

By Joanna Manning of the Faculty of Law, University of Auckland

The first part of this article was published at [1986] NZLJ 214. In this concluding part Joanna Manning looks at the American experience in detail. She concludes that the liberalisation of the touting rule is to be welcomed, which is not a view that everyone in the profession will share. She contends that the lifting of restraints will increase public access to the legal system and enhance public confidence in the profession. The author is a lecturer in law at Auckland University from which she graduated in 1980 before continuing her studies at George Washington University School of Law. She has been involved in legal practice for periods in Auckland and Washington DC.

There is still much difference of opinion in the United States on how much advertising should be permitted. Once started, however, the first changes were extremely rapid. The nature of the practice of law was literally changed overnight in 1974 when US Supreme Court declared mandatory fee schedules to be in restraint of trade in violation of the Sherman Anti-Trust Act 1890 in *Goldfarb v Virginia State Bar* 421 US 773 (1974), and again in 1976 when it held that an absolute prohibition on lawyer advertising offended the First Amendment to the US Constitution's guarantee of "freedom of speech" in *Bates v State Bar of Arizona* 433 US 350 (1976).

Narrow ruling

The holding in *Bates* was deliberately narrow. The Court, limiting its decisions to the facts before it, held that the various states could not restrain publication in a newspaper of a truthful advertisement about the availability and price of routine legal services. A disciplinary rule promulgated by Arizona's State Bar purporting to do so was unconstitutional.

However Blackman J writing for the Court said that it was still permissible for the states to regulate false or misleading advertising. For instance quality claims or solicitation might be found so likely to deceive as to require total prohibition. A disclaimer or warning might be necessary in some cases to avoid deception, and the states could regulate the time, place and manner of advertising. *Bates* itself dealt with publication in a newspaper. So, like the NZLS's April 1985 rules, *Bates* permitted only publication in the printed media in words only of the availability of routine legal services. The only difference was that in *Bates* the Court sanctioned the publication of fees — something not permitted by the April 1985 rules.

There has been no general agreement since *Bates* in the states about the proper ambit of lawyer advertising. On 10 August 1977 in quick response to *Bates* the House of Delegates of the American Bar Association approved a report recommending the appointment of a Commission on Advertising. Its draft Proposals "A" and "B" were circulated to the states as alternatives for their consideration. Proposal "A" is regulatory in nature, specifically authorising certain types of advertising — in print, on the radio, and after amendment in 1978, on television. Proposal "B" is less restrictive and approximates full-scale advertising. It is directive, permitting any form of public communication except "false, fraudulent, misleading or deceptive statements or claims".[1] Proposal "A" corresponds with the NZLS's approach in the April 1985 rules, while Proposal "B" is strikingly similar to the later December 1985 rules. The report recommended the amendment of

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So often we find that one topic requires extensive searching amongst a number of authorities and even then no direct answer or suitable precedent emerges. This book is outstandingly good in dealing with this problem. It provides a complete analysis of the law on a particular subject together with the precedents for the steps to be taken.

I commend the editor and his compilers for their efforts in achieving such an excellent publication. To say that if fills a gap in legal publications would be to give it faint praise; it achieves far more than that in its coverage of subdivisional legalisation, practical examples of problems involved, good precedents and a very efficient index. This book is an object lesson in what can be achieved by careful use and methodical presentation of a mass of material emanating from textbooks, articles in professional journals and the wide experience of the strong professional body of compilers. □

This article was originally published at [1986] NZLJ 238. Unfortunately in setting the article four paragraphs that should have appeared at the beginning of the article on p 238 were transposed into the body of the text at p 239. To clarify the position and to avoid confusion the article is reprinted in this issue. An apology is made to the author for the error in setting and for any difficulties this may have caused her.

state codes in accordance with Proposal "A".

Specified types of advertising

The states' reaction to *Bates* was mixed. Typically only certain specified types of advertising were authorised. Most states maintained a restrictive approach, permitting little more than that which *Bates* had held constitutionally mandatory. As at February 1980, 29 states had adopted Proposal "A" while 19 had adopted Proposal "B" with two states doing nothing and Texas simply suspending all rules inconsistent with *Bates*. All states except two allowed newspaper advertisements; ten specifically disallowed radio advertisements, and 12 disallowed television advertisements. Twenty-three states required that legal advertising be "dignified". Only 11 states permitted lists of routine services to be published.[2]

Permissible regulation of advertising

The Supreme Court decision of 25 January 1982 in *In the Matter of RMJ* 102 S Ct 929 (1982) illustrates that some states had not gone far enough in revising their rules on lawyer advertising after *Bates*. Missouri had revised its absolute rule prohibiting lawyer advertising in the light of *Bates*. In an effort to strike a balance between total prohibition and full-scale advertising, its new rule restricted advertising to newspapers, yellow pages of telephone directories and periodicals. An addendum to the rule, imposing additional restrictions, provided that if a lawyer chose to advertise areas of practice, he or she must utilise the descriptive terms set out in the rule. Deviation from them was not permitted. Missouri's rule also regulated the use of professional announcement cards. It did not permit a general mailing: cards could be sent only to "lawyers, clients, former clients, personal friends and relatives".

Upon commencing private practice in St Louis, Missouri in April 1977, the appellant placed several advertisements in local newspapers and the yellow pages of the local telephone directory. These contained the information that the appellant was licensed to practise in Missouri and Illinois, as well as the statement that he was "admitted to practice before the United States Supreme Court" — information not expressly permitted by Missouri's rule. The advertisements also included a list of the areas of his practice differing from the prescribed descriptions — "personal injury" instead of "tort law"; "real estate" instead of "property law" — and included areas not listed. He also mailed announcement cards to addresses not included in the class limited by the rule.

Powell J's opinion defined more precisely the area of permissible regulation of advertising after *Bates*. Restrictions on misleading advertising continued to be viable. Inherently misleading advertising and that indicated by experience to be in fact deceptive could be prohibited absolutely. But potentially misleading advertising only could not be absolutely prohibited. Restrictions must be no broader than necessary to protect the public. Even advertising with no misleading potential at all could be regulated, providing it was done narrowly and the state could demonstrate a substantial interest in its regulation.

The restrictions on listing areas of practice and the jurisdictions in which one was licensed to practise created by the rule were held unconstitutional limitations on the appellant's speech. These had not been shown to be misleading and Missouri had asserted no substantial interest in them. The Court reached the same conclusion on the restriction of the class of persons to whom announcement cards could be posted.

Permissive approach

On 2 August 1983, the House of Delegates of the American Bar Association adopted a set of *Model Rules of Professional Conduct*. These are dominated by the permissive approach, exemplified by the former Proposal "B". False and misleading communications generally are prohibited, as are communications likely to create "unjustified expectations" about the results a lawyer can achieve. The Comment to the rule states that this would prohibit the publication of results obtained on behalf of a client or advertisements containing client endorsements, since these may create the unjustified expectation that similar results could be achieved for others without reference to individual circumstances.

In a recognition that "questions of effectiveness and taste in advertising are matters of speculation and subjective judgment" and that "[t]elevision is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income" (ibid, at 59). Rule 7.2 permits advertising of a wide variety of information on all public media, including television. Rule 7.4 permits a lawyer to indicate areas which s/he does or does not practise in, but limits the circumstances in which s/he can claim to be "specialist" to those specialisms recognised by the state where s/he is licensed to practise. The Association considered this necessary to avoid deception by falsely implying formal recognition as a specialist.

The Model Rules are obligatory only if adopted by the state. Since the ABA adopted them in August 1983, many states have yet to react to them. They do, however, stand as an implicit challenge to the more restrictive approaches adopted by many states. The widely varying points on the spectrum between absolute prohibition and full-scale advertising selected by the states, the Supreme Court's decision invalidating Missouri's post-*Bates* rule in *In the Matter of RMJ* and the adoption of a relatively unrestrictive Model Code by the ABA illustrate that the advertising controversy in the United States is far from resolved.

Solicitation of business

The same ambivalence is illustrated in the two decisions decided by the Supreme Court on 30 May 1978 on the issue of solicitation left open in *Bates*. In *Ohralik v Ohio State Bar Association* 98 S Ct 1919 (1978) an attorney solicited the business of the driver and passenger in a car accident. He visited the driver in hospital on two occasions where she was in traction before persuading her to sign a contingent-fee contract. He also visited the passenger at home on the day she was released from hospital. She orally agreed to a contingent-fee

arrangement. He secretly recorded conversations with both women about the accident.

Eventually both discharged him, whereupon he filed suit against them for breach of contract. When her claim was settled, the driver paid Ohralik one-third of her recovery in settlement of his lawsuit against her.

In an opinion written by Powell J, who had dissented in *Bates* on the First Amendment issue, the Court held that a state could constitutionally forbid face-to-face solicitation for pecuniary gain under circumstances likely to pose dangers that a state had a right to prevent. He considered *Bates* distinguishable on the ground that solicitation is quite different to truthful advertising about the availability and terms of routine services. While they share the same informational function, solicitation lacks the distance of advertising. It may thus exert a pressure not present in advertising. An immediate response is often demanded. It encourages speedy and uninformed decision-making without the opportunity for comparison or reflection (ibid, at 1919).

The Court, in a "parade of horribles", enumerated the evils of solicitation. Because a lawyer is a professional trained in the art of persuasion and the person solicited is often unsophisticated, injured or distressed, the dangers of improper influence are enhanced. Overtures of an uninvited lawyer may distress simply because of obtrusiveness and invasion of privacy. Since it is removed from public scrutiny, solicitation is harder to police or counteract. The Court concluded that these inherent evils demonstrated a need for the prophylactic regulation of solicitation to protect the public. It was not necessary to prove actual damage resulting from solicitation prior to regulating it.

Availability of free legal assistance

In *In re Primus* 98 S Ct 1893 (1978) the Court distinguished the activities of Primus from those of Ohralik. Primus was a co-operating attorney with a branch of the American Civil Liberties Union. She sent a letter to a woman advising her of the availability of free legal assistance for her case. The Court considered the letter to be protected by the First and Fourteenth Amendments' guarantee of "freedom of association", rather than as involving rights of freedom of speech with which *Bates* and *Ohralik* were concerned. It said Primus was urging collective activity to obtain meaningful access to the Courts, which had been protected in the line of cases commencing with *NAACP v Button* 371 US 415 (1963). (See also, *Railroad Trainmen v Virginia Bar* 377 US 1 (1964) and *United Transportation Union v Michigan Bar* 401 US 576 (1971)).

Also of significance was the fact that Primus, unlike Ohralik, was not motivated by pecuniary gain. Sending a letter, compared with a face-to-face approach, did not involve the same degree of breach of privacy and substantially lessened the possibility of undue influence or overreaching. Thus while the prophylactic regulation of solicitation was permissible because of the potential for the various dangers recited in *Ohralik,* greater precision in regulation was required in the context of political expression and association.[3]

The two cases are extreme examples of solicitation of business. *Ohralik* involved almost as blatant a case of "ambulance chasing" as could be imagined, while *Primus* was concerned with the activities of an attorney acting on behalf of a non-profit organisation for no pecuniary gain in a situation where there was little potential for undue influence. The posture of the two cases presented to the Court, which decided them on the same day, prevented it from considering solicitation falling between the two poles, in particular what Marshall J called in his concurring judgment "benign commercial solicitation".[4]

Advertising and solicitation

The rather skewed artifical presentation of the issue and the striking example of abuse provided by *Ohralik* pushed the Court to the contemplation of the evils of solicitation without a consideration of the benefits it, like advertising, could serve. Thus it carved out only a narrow exception for the clearly desirable non-commercial solicitation illustrated by *In re Primus.* The philosophy of these decisions appears to be inconsistent with that in *Bates.* Only Marshall J noted the inconsistency:

> In view of the similar functions performed by advertising and solicitation by attorneys, I find somewhat disturbing the Court's suggestion in *Ohralik* that in-person solicitation of business, though entitled to some degree of constitutional protection as "commercial speech", is entitled to less protection under the First Amendment than is the kind of advertising approved in *Bates*. . . . The First Amendment informational interests served by solicitation, whether or not it occurs in a purely commercial context, are substantial, and they are entitled to as much protection as the interests we found to be protected in *Bates* 98 S Ct 1928 (1978).

He considered that while the dangers of commercial solicitation are greater than those of publication by advertisement, a total ban on solicitation unduly restricts the free flow of information. Its dangers could be addressed by more specific restrictions.

It is submitted that advertising and solicitation are, as Marshall J recognises, more closely allied than *Primus* and *Ohralik* would suggest. Both disseminate potentially useful information to the public. Direct mail solicitation, in particular, can be seen as a form of advertising. The Court did not distinguish between commercial solicitation by mail, which offers less of an opportunity for overbearing the will of the recipient, and direct solicitation in person, or between coercive and non-coercive solicitation.

Not surprisingly, since *Ohralik* and *Primus* required no affirmative change to state codes, the solicitation rules remain generally unaltered as a result of these decisions. Face-to-face solicitation remains illegal in all states, except Maine and the District of Columbia, whose codes prohibit solicitation which would be false, fraudulent, misleading, deceptive, coercive or done through duress or aimed at a client in a physical or mental condition which would make it unlikely that he or she could exercise reasonable judgment. The states' rules have generally survived constitutional challenge.

Direct mail communications

Thirty-seven states prohibit direct mail communications. In many other states, however, their legality is unclear, depending upon whether direct mail communications are classified as advertising or solicitation under the particular state code. The cutting edge of litigation in the states has involved this question. The cases illustrate the unsatisfactory inconsistency between *Ohralik* and *Bates*. The result of the litigation turns upon a fine distinction between protected "advertising" and unprotected "solicitation". In many cases this is a distinction without a difference.

In *In matter of Koffler* 420 NYS 2d 560 (1979) the Appellate Division (Second Department) of the Supreme Court of New York addressed the distinction. The respondent attorney had placed an advertisement in the real estate section of a daily newspaper, quoting his fee for a real estate closing. Thereafter his firm mailed 7,500 letters to homeowners and real estate brokers, enclosing copies of the advertisement and offering to do closings at a still cheaper rate.

The legality of the letters, enclosing the advertisement, was in question. It was not disputed that the advertisement was legal. The respondent relying upon *Bates*, challenged the constitutionality of the state rule in so far as it applied to the letters. The Court held that the letters could not be classified as a form of advertising, but constituted solicitation which could be properly proscribed.

The difference was that the letters were sent out to particular individuals, whereas advertising informs the public generally. However, it is significant that, in recognition of the respondent's good faith reliance on *Bates* and the difficulty of classification, the Court declined to impose a sanction. Instead it gave notice that future violations would not go unpunished.

Despite the New York Court's belief in the "significant [difference]" (ibid, 571) between advertising and solicitation, the Supreme Court of Kentucky reached precisely the opposite conclusion in *Kentucky Bar Association v Stuart* Ky, 568 SW 2d 933 (1978). Letters mailed to two real estate firms quoting prices for routine transactions were not solicitation, but "advertising by letter" (ibid, at 934) protected by *Bates*. None of the evils of solicitation in person were present. The fact that the advertisement was in the form of a letter did not increase the likelihood of those evils occurring.

Thus, in one case the mailing of 7,500 letters was held to be solicitation and properly prohibited, while in the other two letters constituted permissible advertising. On the one hand, publication in a newspaper was legal, but mailing of the same advertisement to 7,500 people was not. The illogicality is plain and stems from the inherent inconsistency between *Bates* and *Ohralik*. It is submitted that the Supreme Court of Kentucky's approach is preferable, since it recognises that solicitation, like advertising, can help people learn about the nature and availability of legal services.

Its approach is consistent with that taken by the ABA's Model Rules. While recognising the potential abuse inherent in direct private solicitation and thus prohibiting it altogether, Rule 7.3 nevertheless permits general rather than specific, targeted mailings, recognising that these are more akin to advertising than solicitation:

> General mailings not speaking to a specific matter do not pose the same danger of abuse as targeted mailings, and therefore are not prohibited by this Rule. The representations made in such mailings are necessarily general rather than tailored, less importuning than informative. They are addressed to recipients unlikely to be specially vulnerable at the time, hence who are likely to be more sceptical about unsubstantiated claims. General mailings not addressed to recipients involved in a specific legal matter or incident, therefore, more closely resemble permissible advertising rather than prohibited solicitation. (House of Delegates of the ABA, *Model Rules of Professional Conduct* (2 August 1983), note 21, comment to Rule 7.3.)

Touting prohibition unjustified

It is submitted that the retention of the touting prohibition in New Zealand is unjustified. While it is recognised that direct solicitation of business carries a greater potential for abuse than does advertising, this danger does not justify its total prohibition. This great potential for undue influence and overreaching resulting from direct contact between solicitor and potential client can be met by increased regulation of solicitation than of advertising.

Repeal of the touting rule, to be replaced by a permission and regulation of areas of potential danger to the public, is justified because:

(1) Solicitation and advertising are closely allied. Each is important in educating consumers and through the dissemination of valuable information about legal services, assisting them in the fundamental task of locating the cheapest available producer of acceptable quality. The present touting rule would not permit face-to-face solicitation of any kind. Even the relatively non-coercive, non-commercial solicitation afforded by the example in *In re Primus* would not be permissible.

(2) The present touting rule introduces an uncertainty in the case of direct mail communications. Their legality will depend upon whether they are considered to be advertisement or solicitation.

(3) The present touting rule probably operates to the prejudice of smaller firms, sole practitioners and newer entrants.[5] For larger, established firms the traditional reputational model of lawyer selection still works well in bringing clients and firms together. Access to information through business and social contacts is high. Restrictions on touting enhance the importance of more covert forms of solicitation, which are difficult to challenge. The point has been made forcefully by one American commentator:

> [The] rules appear on first sight to be broad and absolute. But they are practically meaningless — at least for a particular class of lawyers and clients — because of certain exceptions to the anti-solicitation rules. . . . [T]hose who are customed to retaining lawyers, say, for their tax or estate work, and those who have attorneys who are relatives and

> friends, are the kind of people who can be solicited despite the rule. As to that socio-economic class of people, there is no impropriety in solicitation. . . .[L]awyers have been known to take tax deductions for membership fees in country clubs, on the ground that such fees are an ordinary business expense — that is a means of discreetly soliciting business.[6]

Impact on smaller firms

Liberalisation of the touting rule suggests a relatively insignificant impact on large-firm lawyers. However this model has largely broken down for smaller firms and sole practitioners, who tend to represent people of moderate means. This sector of the population has a relatively high level of unmet legal needs.[7] For them the cost of legal services is critical. It is here that demand is at its most elastic. Relaxation of the advertising restrictions has gone some of the way to enabling these lawyers to reach consumers hitherto inaccessible to them. Lifting the touting restriction forecasts greatest impact on smaller firms and younger and sole practitioners and the people they represent.

Barristers' services

The NZLS in its examination and overhaul of the rules on lawyer advertising concluded that the objections to restrictions on the advertisement of solicitors' services did not apply to advertisement by barristers of their services. The primary distinction responsible for this difference in conclusion is presumably that while solicitors are engaged directly by the public, barristers are briefed through an intermediary, the solicitor, and the public cannot approach a barrister directly. The informational function of advertising is satisfied because a client has access to the advice of his or her solicitor on the selection of a barrister. If solicitors have sufficient information and access to adequately select counsel, there is no harm to the general public.

This rationale however is based on the assumption that choice of counsel is properly the solicitor's and that the client will or should be content to abdicate that choice in favour of his or her solicitor or at most acquiesce in that selection. Surely the better view is that it is the client's interests which are at stake, not those of the solicitor, and accordingly the ultimate decision should be the client's.

A solicitor's advice is of course very valuable and likely to be the most influential, but it ought not to provide the only avenue of information upon which to base selection. It would be preferable for the client to have access to an independent source of information to supplement at least, or if need be, challenge a solicitor's selection.

The present rules assume too that solicitors are knowledgeable about the services offered by barristers and that the advertising restrictions create no difficulties for them. If solicitors are experiencing difficulties in choosing suitable counsel, it is assumed there are "ways" in which less well-informed solicitors can obtain reliable information, such as District Law Societies or *The Law List*.

One suspects, however, that some solicitors, especially those in country areas, do experience difficulties in selecting counsel or discovering specialists in particular fields of law. A "half-way house", which would permit barristers to advertise their services to solicitors only perhaps in a card-only form, could well address informational difficulties experienced by solicitors in making a selection on behalf of their clients and deserves consideration.

In addition the question of whether barristers should be permitted to publicise those areas in which they specialise needs addressing. Solicitors are prohibited from doing so as a result of the fear that the public would be misled by the false implication of formal recognition as a specialist. But if advertising by barristers was permitted to solicitors only, this danger virtually disappears. In any event there would seem to be no reason to place barristers on a different footing from solicitors in prohibiting them from publicising fields in which they practise.

Use of in-house specialists

The trend towards larger firms providing the full range of legal services discourages the briefing of counsel in favour of the use of in-house specialists. The firms have an advantage in that they can advertise. The difficulties experienced by new barristers in establishing themselves at the Bar and by barristers in competing with the larger firms are likely to be felt more keenly. It is suggested that these difficulties are related to restrictions on barrister advertising and could be alleviated by their relaxation.

Reliance upon reputational advertising is probably no easier for barristers, especially new competitors, than for smaller firms of solicitors and sole practitioners. Advertising could be important in assisting new, less well placed barristers to break into practice at the Bar and enabling barristers to compete on more equal terms with solicitors. While only tentative conclusions are reached here, the real point is that the case against barrister advertising has not been convincingly put. If barristers are to continue to receive unequal treatment, the reasons should be thoroughly explained to them. Since the existing rules may unfairly prejudice barristers, the suggestion of a "half-way house" permitting publicity to solicitors warrants consideration. The question of barrister advertising remains an area for debate and potential reform.[8]

Hardening of attitudes

In the United States, as here, there was no overnight rush to take advantage of the Supreme Court's decision in *Bates*. As *Bates* recedes with the seventies, it appears, however, that the minority who do advertise is growing year by year. At the same time the proportion of lawyers who "absolutely will not advertise" has also grown, indicating a hardening of attitudes. In a 1978 Law Poll only 3% of respondents had advertised. In 1981 the Poll indicated that 10% had done so. The increase continued — 13% had publicised their services in 1983.

There was a dramatic surge in the proportion of lawyers who absolutely would not advertise from 49% in 1979 to 67% in 1981. Of interest is the fact that 34% favoured allowing direct solicitation for their legal businesses in 1983 (Law Poll, 69 ABAJ 892 (1983)).

A trend has been noted that established firms continue to rely primarily on reputation to attract clients, while the propensity to advertise is strongest among lawyers

in lower income brackets. In July 1979 the ABA found that 14% of lawyers with incomes of $25,000 or less had advertised, whereas only 3% of those in the over $50,000 bracket had done so.[9] The 1983 Law Poll also indicated that advertising is concentrated among smaller firms. Only 5% of firms of ten or more had advertised, while 23% of firms of three or fewer had (Law Poll, 69 ABAJ 892 (1983)).

Forms of advertising

Advertisements in the yellow pages and newspaper classifieds remain the most common form of attorney advertising. The majority seem to be adhering to conventional print or the electronic media. A few however have employed unconventional approaches such as printing tee-shirts with the firm's name, personalising number plates, or dressing up in costumes. The most notorious is Ken Hur, a trial lawyer from Madison, Wisconsin. He ran a trailer from an aeroplane "Call Ken Hur" at a football game and drives a hearse with "No Frills Wills $15" written on the side. His television advertisement pictures him emerging from a lake in scuba gear, suggesting members of the public "in over their heads" consult him for bankruptcy advice.

The available evidence suggests that those larger firms who do advertise tend to prefer to employ outside public relations experts, while smaller firms remain faithful to advertising. According to the 1983 Law Poll, of those larger firms which had advertised, 14% had used outside public relations firms and 20% had used in-house resources for public relations activity (supra, Law Poll).

Of most interest is the emerging trend that advertising appears to have facilitated the development of legal clinics and chains, specialising in the delivery of routine legal services in greater volume at a lower cost than those of traditional firms. Advertising has communicated to a sector of the population whose legal needs have not been adequately serviced in the past. These consumers, people of moderate means, are more isolated from word of mouth reputation information.[10]

Many do not seek out legal advice because of the feared cost of legal services, a fear which is in many cases unjustified.[11] For them the cost of legal services is crucial. They are particularly concerned to obtain routine legal services at reasonable prices. While advertising is still in its infancy, the available evidence suggests that it has assisted lawyers to tap this potentially limitless and hitherto latent demand.

Effect of advertising

A study carried out by Timothy Muris and Fred McChesney, has measured the effect of advertising on price and quality, by comparing the Los Angeles-based Jacoby and Myers, the oldest and one of the most successful legal clinics, with traditional firms in the locale which did not advertise.[12] They argue that the increased volume of business generated by advertising pushes lawyers to make changes in the delivery of legal services and realise economies of scale. They cite at least four cost-saving methods, which higher planned volume would allow lawyers to take advantage of: increased specialisation; implementation of systems management; greater use of paralegals; and greater substitution of capital for labour (pp 183-189). They stress that lower costs will result in lower prices, regardless of the degree of competition in the profession: "even a profit-maximising monopolist's price will fall when its costs fall" p 189. To the extent that the profession is more competitive, however, there is an added incentive to pass on cost savings to consumers. More efficient producers will attract a larger share of the legal services market. Accordingly average prices will fall.

These benefits of increased planned volume are possible, because there is a considerable degree of standardisation in lawyers' services. Many are routine, and thus susceptible to high volume, low cost production techniques. In the past, say Muris and McChesney, the full advantage of such economies of scale has not been exploited by lawyers because restraints on advertising have prevented the generation of necessary volume.

Their comparison indicated that clinic prices were lower than those of traditional non-advertising firms, at least for routine legal services. They also devised two tests to evaluate the possibility that these differences were attributable to quality differences. The first test compared clients' subjective evaluation of Jacoby and Myers to reactions of clients of other firms; the second employed an objective measure of quality, by comparing the performance of Jacoby and Myers with that of traditional firms in the area of child support awards. They concluded:

> Our evidence conclusively rejects the proposition that firms charging lower prices will necessarily produce lower quality services. Further, the evidence indicates that by some measures the one clinic studied actually provides *better* quality than its traditional competitors (pp 205-206) (emphasis in original).

The ability of the clinic to drop prices was achieved by low-cost techniques made possible by an increase in demand through advertising, rather than reducing the amount of care taken on each case. Lori Andrews suggests that "perhaps some of the factors that the professon sees as indicating quality are merely indications of status, which a member of the public might decide to forgo".[13]

Jacoby and Myers consider advertising to have been crucial to the success of their business. In ten years of operation the firm has grown from a single clinic to over 80 offices. It advertises on national television in four major cities.[14] Joel Hyatt, founder of America's largest chain of low-cost storefront law offices, with 118 offices in 17 states, has reportedly spent $2 million on television advertising. (*Taking Issue with Burger,* USA Today, 15 February 1984). For these firms, advertising becomes a commitment which cannot be discontinued. The Oakland-based firm of Yanello and Flipper suffered a precipitous decline in business when it stopped advertising for a while.[15]

Relevance for New Zealand lawyers

While the scale of these operations is foreign to this country, the point of relevance for New Zealand lawyers is that advertising appears to encourage the development of storefront offices and clinics offering routine legal services at competitive prices without

sacrificing quality, typically to the less well-to-do who have seldom before visited a lawyer.

The liberalisation of the touting rule in the Code of Ethics is to be welcomed. The most important value served by lifting restraints is to expand the information available to consumers and increase public access to the legal system. The American experience suggests that there are also pro-competitive benefits. Questions remain for future debate whether the changes to the Code go far enough, in particular whether the "touting" rule should be retained and whether barristers should continue to be excluded from the benefits of advertising their services. In the final analysis the profession's willingness to embrace reforms in this area, together with the abolition of the Scale, can only enhance public confidence in the profession. □

1 For the proposals set out in full, see L Andrews, *Birth of a Salesman: Lawyer Advertising and Solicitation* (1980) at 97-134.

2 Ibid, at 135-146.

3 98 S Ct 1908 (1978). The greater constitutional protection is based in part on the practical need to encourage the co-operative non-profit activities of attorneys like Primus.

4 This he defined as "solicitation by advice and information that is truthful and that is presented in a non-coercive, non-deceitful and dignified manner to a potential client who is emotionally and physically capable of making a rational decision either to accept or reject the representation with respect to a legal claim or matter that is not frivolous". Supra note 3, at 1927 n 3.

5 See T Muris and F McChesney, *Advertising and the Price and Quality of Legal Services: the Case for Legal Clinics* [1979] 1 AB Found Res J 179, 183.

6 M Freedman, *Lawyers' Ethics in an Adversary System,* 116-7 (1975). Freedman argues that lawyers have a "duty to chase ambulances". In contrast to the strictures against advertising and solicitation, "attorneys have a professional duty to stir up litigation when they are acting to advise people, who may be ignorant of their rights, to seek justice in the Courts" (p 118).

7 B Christensen, *Lawyers for People of Moderate Means* (1970) at 128-135.

8 See generally the Monopolies and Mergers Commission, *Barristers Services,* HOC 559 (28 July 1976). The Commission opposed lifting restrictions on the advertising of barristers' services.

9 L Andrews, supra note 1, at 83.

10 B Christensen, supra note 7, at 128-135.

11 Two studies conducted into local needs for legal services in Christchurch and Dunedin prior to the establishment of student-run law centres in those cities revealed that in the absence of precise cost information, misconceptions relating to price occur. In particular, people tend to over-estimate significantly the cost of routine legal services. See Dunedin Community Law Centre, *Reports on Local Legal Needs* (December 1980-February 1981). Both studies are reported in *Public Attitudes to Lawyers,* [1982] NZLJ 269. See also, *Bates v State Bar of Arizona,* 433 US 350, 370 and n 22, 376 and n 33.

12 Supra note 5.

13 L Andrews, supra note 1, at 82.

14 C Anderson, *How Lawyers are playing the Advertising Game,* 1981 Cal Law 34.

15 Supra note 13, at 71.

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Court of Appeal decisions treat as only voidable contracts entered into in breach of articles disqualifying interested directors from voting (see *Transvaal Lands Company v New Belgium (Transvaal) Land Development Co* [1914] 2 Ch 488 and *Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549 cf *Grant v United Kingdom Switchback Railways* (1880) 40 Ch 0 135). The distinction is important for the availability of rescission or cancellation after winding up.

4 This comparison is only a parallel — the House of Lords in *Ashbury Railway Carriage Co v Riche* (1875) LR 7 HL 653 made it clear that a contract outside the memorandum is ultra vires and not illegal — see Lord Cairns LC (at p 672).

5 See, however, the analysis of Powell J in *Russell Kinsela Pty Ltd v Kinsela* [1983] 2 NSWLR 453, affirmed on other grounds in (1986) 4 ACLC 215.

6 See J H Farrar & M Russell *Company Law & Securities Regulation in New Zealand* p 223 et seq and more recently *Nicholson v Permakraft (NZ) Ltd* [1985] 1 NZLR 242 CA.

7 C Baxter in [1970] CLJ 280, 313 in propounding the theory which the Court appears to have adopted in *Rolled Steel* opined that an exercise by directors of powers for purpose outside the memorandum would be voidable only.

8 See, however, *Wildia Pty Ltd v Lee* (1986) 4 ACLC 215 for the extent to which rescission of a voidable contract is possible where the other party is a director.

9 Cf *Re Efron's Tie and Knitting Mills Pty Ltd* [1932] VLR 8; *Langley v Delmonte and Patience Ltd* [1933] NZLR 77.

10 See footnote 5 and text to it.

11 See footnote 6 above.

12 See ss 46-50 Companies and Securities (Miscellaneous Amendments) Act 1985 (Cth).

Honest witnesses

At the conclusion of the hearing, on the evening of 26 August 1983, I requested counsel to thank the parties who had attended as witnesses for the courteous, dignified manner in which they had given evidence and generally conducted themselves in Court. The strong impression left with me was that this action, and the factors giving rise to it, had torn apart each member of the family. Family honour was under investigation in a way not understood by persons who have not been brought up as Maori persons. It was not an occasion for emotional or inflammatory language. Any criticism by one member of the family of the actions of another was restrained and dignified. I requested counsel to inform the parties that it had been a privilege to listen to the evidence: indeed it had; much more so than in any case I can remember having heard. There were conflicts in the evidence. It was obvious from the beginning that would be so. But each party who gave evidence made proper concessions. I left the hearing convinced that not one of the parties, nor for that matter any witness, had told me other than what he or she understood to be the truth on essential issues. It is one of those rare cases where the Court is required to find the facts from conflicting accounts of honest witnesses: a task which requires close attention to the evidence, applying tests for consistency, finding corroboration where it exists, analysing the circumstantial evidence and drawing the correct inferences. That task I will, to the best of my ability, judicially perform.

Chilwell J

Peihopa v Peihopa [1984] BCL