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Who's Who

The use of name tags at social functions has now become an accepted custom. Recently someone explained that he was wearing such a form of identification so that he would know who he was! It may have been the first specifically human action of Adam to give names to things as the Bible says, but names aren't everything. The question of whether all citizens should be given some specific, unique identification, separate from their name, is one that has been argued about and discussed in many countries for many years, and usually related to the carrying of identification cards.

In 1951 there was a celebrated case in England concerning the production of what was then a universal National Registration Identity Card. The case was *Willcock v Muckle* [1951] 2 AER 367. In that case the appellant was convicted of failing to produce his national registration identity card to a police officer in uniform as he was required to do by the National Registration Act 1939. This Act had been passed as one of the war emergency measures. Although convicted, the justices who dealt with the matter discharged the accused. Nevertheless, he appealed on principle.

The matter was considered by three Judges in the first instance being Lord Goddard CJ and Lynskey and Devlin JJ. They adjourned the case to be heard before a specially constituted Court and gave the Attorney-General an opportunity to appear as *amicus curiae*. The ground of the appeal was that the statute was no longer in force because the emergency situation in respect of which it had been established had come to an end. In common language the argument was that the war was over. Technically the argument was that the Act had a provision whereby it was to continue in force "until such date as His Majesty may by Order in Council declare to be the date on which the emergency that was the occasion of the passing of this Act came to an end . . .". In fact several Orders had been made under similar provisions in other emergency Acts whereby they had come to an end.

The specially constituted Court was one of seven Judges including the Chief Justice, the Master of the Rolls, two Judges from the Court of Appeal and three from the High Court. The decision of the Court was that the legislation was still in force. The earlier repeals of other legislation might have referred to some aspects of the emergency which could nevertheless still be continuing in respect of other aspects. Two of the Judges expressed some doubt about this issue; but they went along with the majority decision.

All Judges were, however, agreed that the justices who first dealt with the matter had taken the correct action in discharging the accused; and the Court expressly stated that this should be done in all subsequent similar cases. Effectively the Court declared the Act to be non-operative as a measure of general social control. In delivering the judgment of the whole Court on this point, Lord Goddard at p 369 said:

> The Court wishes to express its emphatic approval of the way the justices dealt with this case by granting an absolute discharge for, although the police may have powers, it does not follow that they ought to exercise them on all occasions or as a matter of routine. From what we have been told by counsel for the respondent it is obvious that the police now, as a matter of routine, demand the production of national registration identity cards whenever they stop or interrogate a motorist for whatever cause. Of course, if they are looking for a stolen car or have reason to believe that a particular motorist is engaged in committing a crime, that is one thing, but to demand a national registration identity card from all and sundry, for instance, from a lady who may leave her car outside a shop longer than she should, or some trivial matter of that sort, is wholly unreasonable. This Act was passed for security purposes, and not for the purposes for which, apparently, it is now sought to be used. To use Acts of Parliament, passed for particular purposes during war, in times when the war is passed, except that technically a state of war exists, tends to turn law abiding subjects into law breakers, which is a most undesirable state of affairs.

Once introduced, for whatever reason, an identity card will inevitably be used for a great multiplicity of purposes as the facts of *Willcock v Muckle* clearly illustrate. The Public Issues Committee of the Auckland District Law Society has recently issued a report on the question of a system of national identification because of the decision in Australia to have an identity card there. The report of the Committee does not refer to *Willcock v Muckle* specifically, but notes that in England the identity card was abolished in 1951. It was indeed as a result of the practical effects of that decision that the requirement to carry the card was abolished.

Despite what happened in 1951 however, consideration has been given in Great Britain from time to time to introduce a form of national identification system; but it would appear that this has not been considered politically acceptable. There is, of course, in Great Britain a National Health Service number system together with a National Insurance number system. More recently, at the beginning of 1984, plastic national insurance cards began to be issued in England. These contain a magnetic strip on the back of the card.

Among other things, the Public Issues Committee Report looks at the experience in the United States with the now widespread use for identification purposes of the social security number issued to every citizen in terms of the Social Security Act of 1935. The report also considers the situation in Canada which has had a social insurance number (SIN) system since the mid-1930's. The report points out that this SIN number was originally introduced

for one purpose only, which was unemployment insurance. At the time of its introduction the Government of the day gave solemn undertakings that the use of SIN would be restricted solely to this purpose. In 1965, however, the Government extended the use of the number to tax collection purposes. The real situation now is that SIN is used for a wide variety of purposes as set out in the 1981 Report of the Canadian Privacy Commissioner where the purposes are said to:

> include credit applications, employment applications, employee identification, health surveys, insurance, banking, library registration, car and accommodation rental, and even for the registration of children as junior sports participants.

Countries among the western democracies that now operate a national identification system in some way include Austria, Belgium, Denmark, France, Luxembourg, Greece, Spain, Sweden and West Germany; and in most of these countries the carrying of an identification card is a matter of obligation. In the east European communist countries having identity papers of some sort is essential.

The main arguments in favour of identity cards would appear to be economic ones. It is argued that there would be great cost savings through greater efficiency. In Australia the whole idea of the card has been put forward on the basis of reducing tax evasion. It is very difficult in fact to see how this would be successful, but it is this issue that seems to have made the idea of the cards so politically acceptable. According to opinion polls some 70% of Australians are in favour of the introduction of the cards. Many people will find this extraordinary and it may be the result, in part at least, of the way in which the question was asked. There could, for instance, be a big difference in response to the question "are you in favour of you yourself having to carry at all times, under pain of imprisonment, a card issued by the Government and which you must produce whenever demand is made by any police officer, or other authorised civil servant, and also every time you wished to make a major purchase in excess of $250.00 for registration of the transaction, and every time you apply for a job, and every time you wish to purchase a ticket to travel on public transport for a distance greater than 50 miles etc etc".

That question might get a very different answer to one that was framed "do you consider that there should be a unique personal identifier for Australian citizens in order to avoid widespread and wholesale taxation evasion by the rich and dishonest?"

The point is simply that once an identity card is issued and has to be carried by everybody at all times – as is proposed in Australia – then the extension of its use for purposes of social control would appear to be inevitable. In effect it becomes an internal passport, and any protestation to the contrary is simply flying in the face of experience.

On the other hand, in the type of highly organised technological society in which we live, questions of proof of identification arise continually. It is ironic, for instance, that in the country that claims so loudly and vociferously to be the freest in the world there is a continual demand for ID from almost everybody all the time. The United States has become so credit dependent and so technologically sophisticated that this demand has become inevitable.

The Public Issues Committee Report describes what it says is seen by many commentators as being the principal cause for concern. It refers to the possibility of what is called computer matching which involves the comparison of material in two or more separate data bases to build up ever greater information. From the point of view of law enforcement, or tax investigation, the ability to match records from different files in this way can provide basic information. It is said that computer matching in this way means that information concerning very large groups of people which was collected for one purpose can be made available and disclosed for entirely different purposes. It is said that the use of a national identification system would make sophisticated computer matching such as this a very simple operation.

The report of the Public Issues Committee considers that the announcement by the Government that it has no plans to introduce identity cards does not mean that the matter is finally decided. It sums up its expectations as follows:

> Given trends in other jurisdictions with a similar constitutional and legal tradition, together with the fluidity of political views and ideals, it would be surprising if some form of national identification system were not introduced in New Zealand within the next decade. The administrative advantages of such a system are likely to be seen as increasingly worthwhile, especially as both state and private sector personal information systems become more and more automated.

The conclusion of the Public Issues Committee is that when an identification system is eventually proposed here in New Zealand there should be limits on its use and inbuilt safeguards. The Committee is of the view that reform in the area of protection of privacy should now be pursued and not await the day when it finally becomes necessary to deal with it under the pressure of events.

> In a number of other countries such as West Germany and more recently Australia, the introduction of a privacy protection agency has been achieved as a form of "tradeoff" for the introduction of a national identification system. However, we believe that reform in the area of privacy protection law should not be allowed to remain in a state of dormancy, merely to await the day when it finally becomes expedient to promote it as a *quid pro quo* for another end.
>
> Moreover, as public thinking assimilates itself more completely with the "new economic philosophy" of open competition and full reward for effort and initiative (a philosophy which both major political parties apparently now espouse), a notably harder public attitude is likely to manifest itself in cases of suspected tax evasion, welfare benefit abuse, and property offences. Hence, the arguments favouring the introduction of at least a limited form of identification system could well prove overwhelming to the government of the day. The main point is that, in the light of overseas methods and experience, when an identification system is eventually proposed here, its limits and inbuilt safeguards will require careful scrutiny and consideration.

P J Downey

law. Accordingly the phrase "any real or personal estate" must include movable property in England the succession to which was regulated in the present case by the law of Trinidad and Tobago. (This, it is submitted, must be right: see, eg *Re Wilks* [1935] Ch 645, and *Re Kehr* [1952] Ch 26.)

All property worldwide included

His lordship then proceeded on the footing that the words "the residuary estate of an intestate" in s 46 were to be construed as including all the property of the deceased worldwide, including his movables in Trinidad and Tobago. The section (as counsel accepted) could only regulate the succession to immovable property in England. It could not be applied to regulate succession to the deceased's movables since such succession was regulated by the law of his domicile, viz Trinidad and Tobago. Thus the learned Judge held (at 616) that s 46 could only impose a charge for the "statutory legacy" on the proceeds of the English immovables, there being no way in which it could be made to impose a charge on assets not devolving under English law since such charge was part of the English law of succession. In the absence of any possibly applicable hotchpot provision, there was no discernible way in which the charge on the English immovable property could be said to have been satisfied out of the deceased's overseas assets. The widow had taken the benefits of the overseas assets in Trinidad and Tobago either by virtue of her rights in those assets under the intestacy laws of Trinidad and Tobago or under the deed. His lordship said:

> in no way that I can see can it be said that she took those benefits in satisfaction of the charge created under s 46. . . Therefore in my judgment the charge on the proceeds of the English immovable property remains unsatisfied.

He reiterated (at 616) that counsel for the children had sought to escape such a conclusion by submitting that s 46 imposed a charge on the whole estate, including foreign movables. This was seen to be unacceptable,

> for to give s 46 that effect would be to attribute to Parliament an intention to create beneficial interests for purposes of succession in assets which do not fall for purposes of succession to be regulated by English law. In my judgment s 46 cannot operate to create a charge on assets the succession to which is regulated by a foreign law: see at 616.

It was accordingly held that the widow was entitled to her "statutory legacy" out of the English assets.

The Court reached this conclusion "with some regret" and added (at 616) that "there was much force in the trenchant criticism contained in Dicey & Morris pp 613-614 as to the illogicality of requiring English immovable assets to be regulated for the purposes of succession by the lex situs rather than by the law of the domicile [at death]. However, that is the law as it stands at present. If the Law Commission choose to look at the matter they may find factors which suggest that a rule which accords with the view in Dicey would be fairer and better."

In the light of the wording of s 77(1)(a) of the Administration Act 1969 of New Zealand, one can but end this note by applauding this final observation of Sir Nicolas Browne-Wilkinson V-C with the words "hear here!"

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Recent Admissions

Barristers and Solicitors

Apted, J L	Auckland	7 May 1986	Grice, J P	Wellington	4 July 1986
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Baird, K M F	Wellington	21 February 1986	Hill, R G	Wellington	21 February 1986
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Caird, C C M	Wellington	21 February 1986	Krogulec, P St C	Wellington	21 February 1986
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Gray, A G	Wellington	21 February 1986	Peters, T J	Wellington	21 February 1986

course, poses a further problem. What degree of knowledge is required, remembering that the other party may well have no experience in law or medicine? Will constructive knowledge do? The cases, including *Scott v Wise*, are unclear on this. *O'Connor v Hart* is ambiguous on the point, referring in several places to a lunatic who is "*ostensibly* sane". In *Scott v Wise* the only hint that something less than actual knowledge might do is Somers J's reference to *Molton v Camroux* (1849) 4 Exch 16, 19 where it was said that the other party must know "or have the greatest reason to believe". In *Archer v Cutler* [1980] 1 NZLR 386 knowledge of some manifestations of eccentricity was not enough to amount to knowledge of incapacity.

In *Scott v Wise* the question of whether the other parties had knowledge had not been argued before the Judge at first instance, and the point could not be taken on appeal. (The case had been argued at first instance before the Privy Council decided *O'Connor v Hart*.) However, the Court of Appeal felt that any allegation that the other parties possessed the necessary knowledge could not have succeeded. Mr Scott's condition did not seem to have been apparent to his solicitor and accountant, and there was nothing to show that the parties to the transactions knew he did not understand the nature of them.

While the legal test of incapacity formulated in *Scott v Wise* is difficult to apply, no doubt in extreme cases incapacity will be found readily enough: it was in *Archer v Cutler* [1980] 1 NZLR 386, *O'Connor v Hart* and *Scott v Wise* itself. Knowledge may be much harder to establish. To that extent, the *Archer v Cutler* test, now overruled by *O'Connor v Hart*, was simpler to apply: ie that even if the other party was unaware of the incapacity the contract could be set aside if it was *unfair* to the insane party.

There is debate, and it will probably continue, on whether the Privy Council was right to overrule *Archer v Cutler*. It did so because, it said, it was unsupported by earlier cases and out of line with other Commonwealth authority. Yet as Mr Charles Cato has shown in (1986) 12 NZULR 87 it is at least arguable that earlier authority did not preclude the view of the law taken by McMullin J in *Archer v Cutler*. The Privy Council was no doubt persuaded by a variety of reasons. Somers J outlined them thus in *Scott v Wise*:

> There is the pragmatic reality of commercial life . . . ; there is the demonstrable fraud involved in such a case mentioned in *Gore v Gibson* (1845) 13 M & W 623; there is the reflection of objectivity in the case of innocent parties which accords with contractual concepts; and there are more remote matters founded in the history of the law concerning persons of unsound mind.

Yet, despite the fact that the incidence of senile dementia is apparently increasing with increased average longevity, the violation of contractual sanctity occasioned by setting aside unfair contracts with insane persons would be minimal. Where a sane person innocently contracts with an insane person one of them is going to be hurt: the insane person if the unfair contract stands, or the innocent other party if it is set aside. It is a matter of debate which of these solutions is more satisfactory; but at least if a contract is set aside it can be done with compensation, as *O'Connor v Hart* itself in the Court of Appeal shows, and it may thus be capable of providing more satisfactory justice overall.

The protection of the innocent contracting party who relies on objective appearances is no doubt a pervasive policy of the law of contract, but it cannot be said to be without exception. Indeed the law of incapacity beyond the narrow matter of insanity reveals a not very rational diversity of rules.

To take some examples which do not reconcile easily with the insanity rules: at common law, a minor's contract was often unenforceable against him even if the adult party believed him to be of full age (indeed even if the minor lied about his age). Again, a party who has entered a contract mistaking its essential nature can plead *non est factum*, in which case the contract is *void*, not *voidable* as in the case of the insane person (why the difference?) – and in such a case there seems to be no absolute requirement that the other party know of the mistake (although usually that will be the case). Moreover if a drunk person is so drunk that he is deprived of reason his contract may be *void* (9 Halsbury (4 ed) p 229), although if he merely lacks business sense the contract will be *voidable* if his condition was known to the other party. Then again, at common law, the *ultra vires* doctrine in company law was quite capable of upsetting the expectations of an innocent and unknowing party dealing with the company. And in New Zealand since 1977 it would seem that significant mistake by one party unknown to the other can in some circumstances lead to relief being given: the philosophy of *Conlon v Ozolins* [1984] 1 NZLR 489 does not reconcile easily with *O'Connor v Hart* in the Privy Council. The law of contract has not quite decided whether its policy is to protect the infirm or the bona fide purchaser; the rules about insanity laid down in *O'Connor v Hart* cannot be said to have been logically imperative.

Since *O'Connor v Hart* and *Scott v Wise*, it is likely that litigants in this part of the law will prefer to plead unconscionability rather than incapacity. *O'Connor v Hart* affirms that there is an equitable jurisdiction to set aside unconscionable contracts where one party has taken advantage of another's weakness, or victimised him. Unfortunately the Privy Council does not fully discuss the requirements, in particular what is required to constitute "taking advantage" or "victimisation". Nor does it say whether the fairly liberal approach to setting aside in New Zealand cases like *Moffat v Moffat* [1984] 1 NZLR 600 is right. There is a lot of working out to do in this area. In *Scott v Wise* an application to amend the pleadings by allowing pleas of undue influence and unconscionable contract was disallowed.

Gifts

The Court of Appeal in *Scott v Wise* also considered the rules about setting aside voluntary transactions where the donor is of unsound mind. This topic can be dealt with much more briefly.

The Court concluded, relying on

Phillipson v Kerry (1863) 32 Beav 628, that the test of incapacity in relation to voluntary transactions is the same as that in relation to contracts. Furthermore, the transactions are voidable at the suit of the person lacking capacity, not void.

But the Court concluded that the considerations which have persuaded the Courts to hold that knowledge of incapacity is required in the case of contracts do not apply to voluntary transactions.

> In them the donee or beneficiary cannot pray in aid considerations of ordinary commerce – he has given no value and cannot claim the protection of the purchaser for value without notice.

Thus, voluntary transactions will be avoided once lack of capacity is established unless there is some equitable defence.

In this case, while some parts of the transactions in provision were arguably voluntary, the Court concluded it was not appropriate to isolate and characterise only some of the document. The several transactions were connected, and had to be viewed together. So viewed, they fell within the rules about contracts, and required proof of knowledge.

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Conditional contracts and the right to waive a condition

The decisions of the Court of Appeal in the related cases of *Moreton & Craig v Montrose Ltd (in liquidation)* [1986] BCL 780 and *Moreton & Craig v NZ Insurance Co Ltd and others* delivered on the 24th of April this year are of interest to any person having to deal with contracts which are subject to any condition.

The cases both concerned a contract entered into between the appellants, as purchasers, and Montrose Ltd, as vendor, for the sale and purchase of a property in Tauranga on which there then stood a large wooden house of considerable age. In the first action the purchasers were seeking specific performance of the contract, in the second to establish entitlement to insurance moneys payable as a result of the destruction of the house by fire on the night following the making of the agreement between the parties.

The contract for sale and purchase provided for a substantial part of the purchase price to be secured to the vendor by the exec way of second mortgage. It was further provided that the amount of any first mortgage raised by the purchaser was to be limited to such an amount as would not, together with the balance left in on the second mortgage, exceed 75% of the value of the property as determined by the valuer nominated in the contract. This clause thus allowed the purchasers to increase their total borrowings in line with any increase in the total value of the property.

The contract also contained an elaborate condition requiring the purchasers to undertake a feasibility study as to the possibility of developing the property as a private hospital, rest home or hotel, and to provide the vendors with progress reports on this if requested. The contract was stated to be "conditional on their being satisfied by 20 May 1981 that they can economically so develop the property". It was further provided that if this condition was satisfied by that date and the purchasers had provided the progress reports as requested and "have made reasonable progress in applying for such town planning permission, licences and permits as they shall require for such development" then the contract would remain conditional for at least a further month to allow such planning approval to be obtained. Then came the critical phrase "Should either of the above conditions not be satisfied then this agreement shall be null and void".

It was common ground that the purchasers had not complied with the provisions of the planning consent condition. Instead they had purported to waive the condition. It was again common ground that if the purchasers had the right to waive, they had done so timeously. Henry J in the High Court had dismissed both actions by the purchasers, holding that there was no right to waive the conditions. The Court of Appeal upheld his Judgment, and it is in the views expressed by their Honours that the main points of interest in the case arise.

The Court was unanimous in upholding Henry J's view that the planning consent condition was not in the circumstances solely for the benefit of the purchasers. Such matters as the grant of planning permission for development would have a considerable effect on the value of the property and, in the light of the financial arrangements, on the security the property represented for the payment of the balance of the price. Although the condition was not necessarily of great benefit to the vendors, it was of some benefit. On traditional principles it was therefore not a condition which the purchasers could waive unilaterally.

Although this would have sufficed for the determination of the case, each of the Judgments goes on to consider an alternative ground relied on by Henry J that the provision that the contract would be null and void if the condition was not fulfilled was of itself sufficient to show that the condition was not one solely for the benefit of either party, and thus not one that could be unilaterally waived. The discussion of this point leads to the most important statements of principle in the case.

Each of the Judgments rejected the contention of the appellant that the provision that the contract would be null and void if the condition failed of fulfilment was in truth a conditon solely for the benefit of the purchaser in that it gave him a choice whether or not to continue if the condition failed of fulfilment. In the view of all of their Honours the condition could be interpreted in two ways. The first view is to treat it as meaning exactly what it says, in effect as a provision for the automatic termination of the contract. This view follows earlier statements by the Court of Appeal and has the sanction of the Privy Council (see *Neylon v Dickens* [1977] 1 NZLR 595 (CA) affd [1978] 2 NZLR 35). The second possibility was to treat the phrase as meaning that the contract became voidable at the option of either party if that party had not been in default. This is in line with the interpretation such a provision has received in the context of a contract embodying a continuing relationship between the parties (eg *Aetna Life of Australia &*

New Zealand Ltd v ANZ Banking Group Ltd [1984] 2 NZLR 718, a contract of insurance) and the view taken by the Australian Courts (see eg *Gange v Sullivan* (1966) 116 CLR 418 and *Havenbar Pty Ltd v Butterfield* (1974) 133 CLR 448).

All of the Judgments of the Court indicate a preference for the first view, at least insofar as the contract is an executory one for sale and purchase. It was a common view that such an interpretation best conduces to a general degree of certainty in such contracts. In the view of the majority, (Cooke and McMullin JJ), the effect of such a provision is one that must be regarded as being of benefit to both parties. In essence, the extra certainty of result is a matter of benefit to each of the parties. It follows, in their view, that where the contract includes a provision that in certain circumstances the contract becomes null and void, the condition cannot be waived unilaterally by either party. Casey J however regarded the words "null and void" as merely determinative of the result, and not of themselves necessarily being of benefit to both parties.

Each of the Judges accepts that a similar result would have ensued had they held that the contract was one giving either party a right to terminate the contract if the condition had failed. Such a provision would be capable of conferring a benefit on either party in appropriate circumstances and would therefore also mean that the condition could not be unilaterally waived.

The statements of principle outlined above will have a number of very important consequences for all persons dealing with conditional contracts. Firstly, it will be a matter of extreme importance to determine whether or not the form of words used in any contract has the effect of automatically terminating the contract if a condition fails of fulfilment or whether it merely gives one or both parties a right to terminate. Although this case would certainly indicate that cases of executory contracts for sale and purchase form a class of contracts where the words "null and void" will have that effect, it seems clear that not all contracts will be governed by the same rules. If the distinction adumbrated by Cooke J is to be followed, the key question will be whether the contract is one embodying or creating a continuing relationship between the parties. If it is such a contract, and the termination provision has an element of entitlement by one party to forfeiture of some of the other party's rights, then it seems that the words "null and void" will merely serve to create a right to terminate but will not themselves terminate the contract. It may be some time before the exact limits of the classes becomes apparent.

It is to be noted that the Court also emphasised that the determination of the nature of a condition is a question of construction, and evidence as to the parties intentions is not admissible (*Prenn v Simonds* [1971] 3 A11 ER 237). This will make the choice of words actually used in the contract extremely important. It may in the end be a matter of the provenance of the printed form that a real estate agent uses. The standard "long-form" contract declares that the contract is "voidable" if the conditions are not fulfilled. This would presumably not allow the contract to be automatically terminated for non-fulfilment of such a condition. Other forms of words may have the same effect as "null and void". But what may be an arbitrary choice of words may have very considerable effects on the rights of the parties.

It would now seem that where the contract automatically terminates on the failure of a condition there is in reality no room for waiver in respect of that condition at all. Unilateral waiver is not now possible, yet where there is an agreement not to adhere to the original terms of the contract, this will now be a matter of contractual variation rather than waiver. Since both parties are agreeing to give up something which might have been of benefit to them, consideration is present. This will avoid the need to determine, at least in this class of case, whether waiver is made out, and will also obviously render it the less likely that parties will need to place any reliance on arguments of estoppel.

Perhaps more importantly, where the "null and void" provision does have the effect of automatically terminating the contract, there can be, as Casey J notes, no question of waiver arising from events occurring subsequent to the failure of the condition. If there are no subsisting rights on either side, there can be no waiver of the rights. In the circumstances where the contract has been discharged, there can be no requirement that either party take active steps to terminate the legal relationship between the parties.

Quite different rules will apply where the contract does not automatically terminate. Here the critical question will be whether or not the condition gives both parties a right to terminate, or only bestows that right on one of them. If it is the former then it is to be a condition which is not solely for the benefit of either party, and thus not one which may be unilaterally waived. The contract will not automatically determine on the failure of the condition and it may be that in appropriate circumstances a failure to exercise the right of termination will be held to have amounted to a waiver of that right. If it is the latter, then it may be unilaterally waived, but there will still be the need for the party waiving to take some positive step.

Lastly it must be noted that the Court had regard to the problems which may arise where the termination of the contract is caused by a failure of a condition which arises from the default of one party. The Judgments all indicate that the injustice which might otherwise arise in such cases can be avoided by refusing to allow the party in default to rely on the failure of a condition in any action to enforce the contract. Such an approach was foreshadowed in *Neylon v Dickens,* and presumably would operate not unlike self-induced frustration.

One other point of interest arose in consideration of the issues surrounding the claim to insurance money, in that the Court of Appeal for the first time had to decide whether or not s 83 of the Fires Prevention (Metropolis) Act 1774 of the United Kingdom was applicable to New Zealand. Not surprisingly in the light of the consistent application of it in the lower Courts in this country, it was decided that the Act was in force.

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Jurisdiction over extra-territorial conspiracy — an addendum

In *Johnston* [1986] BCL 1155 the Court of Appeal affirmed the decision of Ellis J that a conspiracy to import a controlled drug was within the jurisdiction of New Zealand Courts when, although it had been formed abroad, one of the conspirators had come here and a drug had then been sent here pursuant to the conspiracy. In a previous note it was suggested that in such a case jurisdiction might be established on the basis that a conspiracy can be held to be committed wherever any party to it is during its continuance, whether or not anything is done there in furtherance of it: [1986] NZLJ 185.

In the Court of Appeal, however, the Crown did not argue that the presence of D in New Zealand would suffice, but relied on the arrival of the drug pursuant to the conspiracy. As to that, the Court did not agree with Ellis J that this was "an event necessary to the completion of" the offence, within the meaning of s 7 of the Crimes Act 1961. It was held that "completion" must be given its ordinary meaning in this context of "having come into existence", and, there having been a previously concluded (albeit continuing) agreement, no event was necessary for the "completion" of the conspiracy. Nevertheless the Court concluded that the case was "squarely" within s 7 because "acts forming part of [the] offence" had occurred here. The drug had been sent in a letter in furtherance of the conspiracy, and it followed that:

> The steps taken by airline and governmental officials in the handling of the letter on arrival in New Zealand were acts within the contemplation of the conspirators in the performance of the continuing conspiracy. In that sense they formed part of the continuing offence.

With respect, this seems to involve a greater departure from the ordinary meaning of words than the Court had just rejected in relation to "completion". Acts done by conspirators in furtherance of the common object result from and are evidence of the conspiracy, but do not constitute the offence, and this is even more clearly true of acts of innocent agents. And merely because parties to an agreement contemplate that such acts will be done in the performance of the agreement does not seem to mean that they are acts "forming part of" the continuing agreement, in any ordinary sense of those words. They are not ingredients or constituent elements of the offence, they do not complete it, and they do not cause it to exist.

It is not suggested that in *Johnston* D should not have been held to be subject to the jurisdiction of the New Zealand Courts on the conspiracy charge, but the reasoning of the Court of Appeal might lead to surprising results in other cases. For example, it suggests that there would be jurisdiction if an innocent agent furthered the conspiracy here even though none of the conspirators were ever here during the subsistence of the conspiracy. On the other hand, it has to be conceded that the theory that it should suffice if a conspirator is in New Zealand while the agreement is in existence is also capable of somewhat extravagant results, particularly when combined with the statutory extension of the offence to conspiracy to offend abroad (s 310(1) of the Crimes Act 1961). The existing statutory provisions governing territorial jurisdiction do not readily yield satisfactory solutions to all the questions that can arise when a conspiracy is formed in one place but is to be performed elsewhere.

Two final points may be mentioned. First, the Court of Appeal noted the "extraordinary feature" that it was accepted that D would have had no defence had he been charged with the more serious offence of actual importation. Had the Court found that the conspiracy charge could not succeed, a nice question might have arisen as to whether the Court should have amended the indictment (s 335), although it appears to have been assumed that because the Crown had elected to charge conspiracy other possibilities were not in point. In any similar case in future the unnecessary employment of a conspiracy charge should presumably be avoided. Second, the Court indicated that on some future occasion it might have to consider whether an extraterritorial conspiracy might be triable in New Zealand as a result of the qualification to s 6 of the Crimes Act 1961, which allows jurisdiction over an extraterritorial act if it is an offence "by virtue of any provision of this Act or of any other enactment". It is not clear what caused this doubt and the general statutory provisions dealing with conspiracy (s 310 of the Crimes Act and s 6 (2A) of the Misuse of Drugs Act 1975) do not expressly extend to extraterritorial conduct, in contrast with a number of more specific provisions which cover conspiracy abroad (eg Crimes Act 1961, ss 73(f), 78(b), 96, 98(1)(j), 105(1); cp Adams, *Criminal Law and Practice in New Zealand* (2nd ed), paras 151, 2354.

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Take-over bids and minorities: unfair to whom?

The circumstances under which a shareholder is entitled to object to the compulsory purchase of his shares in terms of s 208 of the Companies Act 1955 have not been a subject of much judicial consideration in New Zealand. This makes the decision in *Re Deans; Re Stevens Group Properties Ltd* [1986] BCL 443 all the more important.

In this case a shareholder holding .1034% of the total capital of NCF Kaiapoi Ltd objected to the expropriation pursuant to a take-over offer by Stevens Group Properties Ltd which had been accepted by the remainder of the NCF shareholders. The basis of this objection was that this particular shareholder had been disadvantaged in that, because he had not accepted the offer, he had remained on the register until 30 September 1985 and was therefore entitled to benefits accruing to the shares until that time. This right, he claimed, would be lost immediately his shares were transferred to the offeror and he therefore requested an amendment to the offer entitling him to any distribution made for the year ending 30 September 1985.

Despite an absence of New Zealand precedent, the Court accepted what English Courts had said and adopted the principles there enunciated. It was therefore held that:

(1) The Court does not have an unfettered discretion but will

only interfere where the scheme is unfair (*Deans* 2; *Re Hoare & Co Ltd* (1933) 150 LT 374);

(2) Unfairness relates to the shareholders as a whole and not to the individual in his particular circumstances (*Deans* 2; *In re Grierson, Oldham & Adams Ltd* [1968] Ch 17);

(3) The onus of proof of unfairness rests on the objecting shareholder (*Deans* 2-3,6,10; *Re Hoare* 375);

(4) It is not necessary to go as far as establishing that the scheme must be "obviously unfair, patiently unfair, unfair to the meanest intelligence". (*In re Sussex Brick Co Ltd* [1961] 1 Ch 289; *Deans* 4).

(5) The size of the majority is a factor to be taken into consideration in determining the reasonableness of the scheme (*Deans* 6).

Applying these principles to the case, Hardie Boys J held that the applicant could not succeed because (i) the grounds related only to the applicant himself; and (ii) they arose not out of the offer but out of Mr Deans' unwillingness to accept it (*Deans* 9). These two aspects will be considered in turn.

Unfairness to the applicant

The Court relied on the well-known dictum by Plowman J in *In re Grierson, Oldham & Adams Ltd* [1968] Ch 17 to the effect that it would be impossible to please every individual shareholder and that unfairness means unfairness to the shareholders as a whole (*Deans* 2); Deans was alone in maintaining that the offer was unfair.

The applicant did not agree that the price offered for the shares was unfair and the Court found this to be the principal obstacle facing him (9); the rights of participation claimed by the applicant could not be quantified in money terms and Hardie Boys J held that:

> . . . [I]n the absence of any material to the contrary, I must assume that the price offered includes fair recompense for the shareholders' loss of their rights of participation, and that it therefore cannot be unfair for them to lose that right as a consequence of their acceptance of the offer.(11)

The applicant had therefore not discharged the onus of proof which rested on him. The learned Judge considered that his conclusion was reinforced by the fact that any distribution would be completely under the control of Stevens and the term asked for by the applicant would be worthless without Stevens' co-operation.(11)

It is true that Deans was the only dissenting shareholder, but then he was also in a unique position and his request for the additonal term seems to have been reasonable. It could happen that a group comprising 10% of the shareholders have similar interests and are severely prejudiced by the compulsory acquisition of their shares; adopting the approach of the Court in *Deans*, their view would be irrelevant. The Court would obviously be influenced by the greater size of the minority, but this does not alter the fact that it is still the shareholders *as a whole* who are considered. It would appear, therefore, that the general proposition regarding unfairness to shareholders is too widely stated.

It is practically inconceivable, in the absence of some type of group interest, such as that in *Re Hoare*, that a small minority (and the minority is, by definition, always small in these cases) of shareholders could ever demonstrate that a scheme is unfair to the shareholders as a whole, nor can that be said to be the intention of the legislature behind s 208. The discretion given to the Court in s 208(1) is clearly designed to protect minority shareholders from the rigours of expropriation which has been voluntarily accepted by a large minority. Although the section makes no mention of the requirement of fairness, this is obviously one of the pivots on which the Court would hinge its discretion. But equally obviously that fairness can only relate to the dissenting shareholders and if it can be shown that there is a good reason why compulsory acquisition should not be ordered, other than one relating to purely personal circumstances of the dissenter, the Court should exercise its discretion favourably. Failure to acknowledge this test leads to the rather absurd proposition in *Sussex Brick* quoted above. It must also be noted that while *Grierson's* case provides support for the conclusion in *Deans*, the shareholders in that case relied on their *personal* circumstances, which were rightly not taken into account.

It is perhaps unfortunate that no reference was made to the statements by the Court of Appeal in *Coleman v Myers* [1977] 2 NZLR 298. Although that case is not directly in point, Cooke J pointed out that the cases on the English equivalent section "have displayed a tendency to place a heavy onus on dissenting shareholders . . . ". (357) In other connections, however, those Courts ". . . appear recently to have been laying some stress on equitable considerations and showing rather more willingness to protect a minority". (358) Cooke J welcomed this tendency and it is submitted that s 208 should not be excluded from its operation; these remarks could have provided valuable guidelines to the Court in *Deans*.

The stress laid on the aspect of price in *Deans* seems to be somewhat wide of the mark; the applicant did not seek an increase in price — he simply wanted an additional term giving him the right to participate. He seems to have realised that this could be worth nothing, although it must have been known by the time of the hearing whether or not any dividend had been declared by 30 September 1985; this does not, however, appear in the report. The Court clearly has jurisdiction to determine the terms on which the acquisition is to take place (see *In re Carlton Holdings Ltd* [1971] 1 WLR 918) and the term sought by the applicant could have been imposed. The fairness or otherwise of the price was not in issue.

As far as the onus of proof is concerned, it is interesting to note that a Canadian Court held in *Robertson v Canadian Carriers Ltd* (1978) 4 BCR 290 (Ont HC) that there is no real onus of proof on either party because the Court must ultimately decide what is fair. While this has been criticised as not resolving the problem (Kolodny "Protection of Minority Shareholders after a take-over bid" (1986) 7 *The Co Lawyer* 17), the role

of the Court is clearly considerable in such matters. *Deans'* case did not decide that the offer was unfair; it simply found that the applicant had not discharged the onus resting on him.

Quite why the fact that any distribution would be in Stevens' discretion should have supported the Judge's conclusion is not clear. The Court did not reject the term because it would have been of no value; this would have been an adequate basis for a decision if that was in fact the case. As the Court reached its decision on a point of onus, however, this aspect does not seem relevant.

Prejudice as a result of rejection

This issue, although cited by the Court as a reason for the dismissal of the application, was not dealt with in detail at all. It is, however, of considerable importance. In *Carlton Holdings,* Brightman J made it clear that the policy of the Companies Act is that "a dissenting shareholder is not to be penalised as a result of his dissent" (1925). Although this was mentioned by Hardie Boys J (*Deans* 12), the very antithesis of this policy was used to justify his conclusion. Furthermore, an application for interest on the unpaid money was refused because either (a) there is no general jurisdiction to award interest; the offeror in such circumstances is not bound to acquire the shares; or (b) the objection had no real merit.

There is no doubt that the applicant in this case had a right to object without incurring any penalty. In the event of an unsuccessful application the offeror is within one month of the date of the notice "bound to acquire those shares on the terms which, under the scheme or contract, the shares of the approving shareholders are to be transferred to the transferee company" (s 208(1)). The statement by Hardie Boys J that the offeree was not bound to acquire those shares is therefore not correct. Obviously it is unlikely that the time period could be complied with and it would therefore seem fair that an award of interest be coupled to the merits of the objections, but this was scarcely considered by the Court. As the applicant remained a registered shareholder, it appears quite reasonable that he should take the benefits of his shares; the fact that the offeror did not envisage this situation is irrelevant. If, on the other hand, he is not to be entitled to the benefits of the shares, then he is surely entitled to interest on the purchase price as happened in *Re Hoare* and *Carlton Holdings.*

Hardie Boys J found it "difficult to accept that the Court has jurisdiction to award interest to an individual dissentient".(12) This appears to be predicated on the approach adopted by the learned Judge towards the question of fairness in general. It would not be unfair to say that the applicant in this case was fighting a losing battle from the start because he was the sole dissentient. It is submitted, however, that in this lies the very strength of his case and that the attitude of the Courts in the past has not been consistent with the policy behind the Companies Act. If justice is to be done to minorities, it is fairness to the dissenters, in all the circumstances, which must be taken as a yardstick for the exercise of the discretion in s 208(1).

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Having two bites at the cherry — or having one's cake and eating it

In *Re Collens (decd)* [1986] 2 All ER 611, the deceased had died intestate in 1966, domiciled in Trinidad and Tobago. He left a widow. There were seven children of his previous marriage, which had been dissolved in 1964. There was one child of his marriage to his widow. His estate at the date of his death had at least three constituent elements: (a) a very substantial estate in Trinidad and Tobago; (b) an estate in Barbados, and (c) a comparatively small estate in the United Kingdom, part of which consisted of immovable property. Litigation in Trinidad concerning the deceased's estate was compromised by deed (the proper law of which, presumably, was the law of Trinidad and Tobago). Under the deed, the assets of the deceased situated in England and Barbados were to be distributed "according to the laws of intestacy applicable thereto," and the administrator was to pay, and the widow was to accept, the sum of $1 million "in full satisfaction of all her share, right, title, estate and interest of and in the estate of the intestate situated in Trinidad and Tobago". Under the law of the deceased's last domicile, the widow was entitled to one third of the estate absolutely and, subject thereto, the children took equally. As far as English law was concerned, it was common ground that succession to the immovable property in England on the deceased's intestacy was regulated by the English domestic law of intestacy. The Court referred, by way of authority, to Rule 98 in Dicey & Morris, *The Conflict of Laws* (10 ed, 1980). This reads:

> the succession to the immovables of an intestate is governed by the law of the country where the immovables are situated (*lex situs).*

For a New Zealand case exemplifying the application of this precept, see *Re Eugster (deceased)* [1929] GLR 440.)

The question before the Court was this: was the widow entitled to her "statutory legacy" (amounting, at the time of the deceased's death, to five thousand pounds, but since markedly increased) out of the English immovables notwithstanding that she had taken $1 million under the deed of compromise and would have been entitled to one third of the rest of the estate under the law of the deceased's domicile? Could she, in other words, take not only the share of the estate under the law of the deceased's last domicile (which regulated succession to his movables) but also the "statutory legacy" under the English domestic law of intestacy in relation to the English immovables? It was common ground that the deed of compromise did not affect this matter.

Real and personal estate

It must be explained at this point that s 33 of the Administration of Estates Act 1925 (UK) provides that, on the death of a person intestate "as to any real or personal estate" the estate is to be held as to real estate on trust to sell and as to personal estate on trust to sell and convert into money such part thereof as may not consist of

money. This globular mixed fund of realty and personalty is then to be applied to pay debts and testamentary expenses etc. The section also states that the residue of the said money and any investments for the time being representing the same, including (but without prejudice to the trust for sale) any part of the estate of the deceased which may be retained unsold and is not required for the administration purposes aforesaid, is referred to in the Act as "the residuary estate of the intestate". The right to the "statutory legacy" already referred to arises under s 46 of the 1925 Act, which is headed "Succession to real and personal estate on intestacy".

Subsection (1) of that section provides, so far as relevant here, that, if the intestate leaves a wife and issue, the surviving wife shall take the personal chattels absolutely, and, in addition, the residuary estate of the intestate (other than the personal chattels) shall stand charged with the payment of a fixed net sum, free of death duties and costs, to the surviving wife with interest thereon from the date of death until paid or appropriated, and, subject to providing for that sum and the interest thereon, the residuary estate (other than the personal chattels) shall be held — (a) as to one half upon trust for the surviving wife during her life, and, subject to such life interest, on the statutory trusts for the issue of the intestate, and (b) as to the other half, on the statutory trusts for the issue of the intestate.

If the English immovables were liable to pay the "statutory legacy" under s 46, the widow would be entitled to five thousand pounds, plus interest, from the date of the death — despite the fact that she had had $1 million out of the Trinidad and Tobago estate.

Counsel for the widow argued that, in dealing with the residue of an intestate in circumstances where part of the estate was in England and part outside England, as a matter of construction s 46 applied only to such part of the estate as was subject to English law — from which it followed that the charge for the "statutory legacy" attached solely to the sale proceeds of the English immovables. Counsel said that there was no question of any charge on any part of the estate not devolving under English law. Thus, he argued, that charge on the proceeds of sale of the English immovable property had to be satisfied, and the widow was consequently entitled to five thousand pounds out of the English estate. Counsel was here on very strong ground. He relied, firstly, on *Re Rea* [1902] 1 IR 451. There, a man had died intestate domiciled in Ireland, leaving realty and personalty in Ireland and realty in Victoria. The proceeds of sale of the Victorian realty were remitted to Ireland not long after the deceased's death. The deceased was survived by his widow. It was held that she could claim (inter alia) not only a "statutory legacy" of five hundred pounds under the Irish intestacy legislation (payable rateably out of the Irish realty and personalty) but also a "statutory legacy" of one thousand pounds under the Victorian intestacy legislation, (payable out of the sale proceeds of the land in Victoria).

Counsel for the widow further relied on *Re Ralston* [1906] VLR 689. There, a man died intestate domiciled in Tasmania, again leaving only a widow. His personal estate in Victoria was worth over eight thousand pounds. His realty in that State was worth some seven hundred and fifty pounds. The Victorian legislation gave the widow a charge against the estate of one thousand pounds in addition to her other rights therein. There was no similar legislation in force in Tasmania. The Victorian administrator of the estate sought to have determined the question: what part of the Victorian assets should be paid to the widow? Cussen J held that she was

> entitled against and in priority to . . . the next of kin to the net value of the real estate in Victoria, so long as such net value does not exceed 1000 pounds, but is entitled, as against the . . . next of kin, to any further or other special charge, payment, or other preference.

Residuary estate of the intestate

Counsel for certain children of the deceased's first marriage put it that s 46 of the 1925 Act did not operate in that way at all, but that the words "the residuary estate of the intestate" meant all the intestate's property of whatever nature and wherever situated, and under whatever law such estate devolved. Counsel accepted that s 46 would not here regulate the devolution of any part of the estate other than the English immovables, but submitted that that did not alter its construction since the words "residuary estate of the intestate" included all of the assets, including those outside the United Kingdom. Hence, counsel continued, on a true construction of s 46, it was the whole estate that was charged with payment of the "statutory legacy" and that charge had been satisfied by payment of considerably more than five thousand pounds out of the part of the estate situated outside England. Thus the English immovables were not subject to any charge for the "statutory legacy".

Sir Nicolas Browne-Wilkinson V-C found this argument attractive, for he was of the view that it was unjust that, because the estate was spread around the world, the widow took not only one third under Trinidad and Tobago law, but, in addition, the further capital sum under English law. It was, however, not possible in his view, on the construction of the 1925 Act, to hold in favour of the children. The draftsman of that Act did not have in mind circumstances such as had arisen here "and one has to do one's best on the basis of the words he has used": see at 615.

His lordship stated that he had difficulties in construing ss 33 and 46 together so as to provide a consistent code regulating the position where an intestate died leaving some assets in England and some outside England: see at 615-616. Section 33, he thought, made it clear that it was dealing with any real or personal estate as to which the deceased died intestate. He said that, for a time, he was persuaded that the section was limited to the real or personal estate the succession to which was regulated by English law, but that he had been convinced by the argument of counsel for the children that that could not be the right construction since the provisions for administration in the section applied not only to assets which passed by way of succession under English law but also to assets which fell to be administered under English law, the ultimate succession to which was regulated by some other system of

law. Accordingly the phrase "any real or personal estate" must include movable property in England the succession to which was regulated in the present case by the law of Trinidad and Tobago. (This, it is submitted, must be right: see, eg *Re Wilks* [1935] Ch 645, and *Re Kehr* [1952] Ch 26.)

All property worldwide included

His lordship then proceeded on the footing that the words "the residuary estate of an intestate" in s 46 were to be construed as including all the property of the deceased worldwide, including his movables in Trinidad and Tobago. The section (as counsel accepted) could only regulate the succession to immovable property in England. It could not be applied to regulate succession to the deceased's movables since such succession was regulated by the law of his domicile, viz Trinidad and Tobago. Thus the learned Judge held (at 616) that s 46 could only impose a charge for the "statutory legacy" on the proceeds of the English immovables, there being no way in which it could be made to impose a charge on assets not devolving under English law since such charge was part of the English law of succession. In the absence of any possibly applicable hotchpot provision, there was no discernible way in which the charge on the English immovable property could be said to have been satisfied out of the deceased's overseas assets. The widow had taken the benefits of the overseas assets in Trinidad and Tobago either by virtue of her rights in those assets under the intestacy laws of Trinidad and Tobago or under the deed. His lordship said:

> in no way that I can see can it be said that she took those benefits in satisfaction of the charge created under s 46. . . Therefore in my judgment the charge on the proceeds of the English immovable property remains unsatisfied.

He reiterated (at 616) that counsel for the children had sought to escape such a conclusion by submitting that s 46 imposed a charge on the whole estate, including foreign movables. This was seen to be unacceptable,

> for to give s 46 that effect would be to attribute to Parliament an intention to create beneficial interests for purposes of succession in assets which do not fall for purposes of succession to be regulated by English law. In my judgment s 46 cannot operate to create a charge on assets the succession to which is regulated by a foreign law: see at 616.

It was accordingly held that the widow was entitled to her "statutory legacy" out of the English assets.

The Court reached this conclusion "with some regret" and added (at 616) that "there was much force in the trenchant criticism contained in Dicey & Morris pp 613-614 as to the illogicality of requiring English immovable assets to be regulated for the purposes of succession by the lex situs rather than by the law of the domicile [at death]. However, that is the law as it stands at present. If the Law Commission choose to look at the matter they may find factors which suggest that a rule which accords with the view in Dicey would be fairer and better."

In the light of the wording of s 77(1)(a) of the Administration Act 1969 of New Zealand, one can but end this note by applauding this final observation of Sir Nicolas Browne-Wilkinson V-C with the words "hear here!"

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Recent Admissions

Barristers and Solicitors

Apted, J L	Auckland	7 May 1986	Grice, J P	Wellington	4 July 1986
Ardern, J M	Wellington	21 February 1986	Haultain, R	Wellington	21 February 1986
Atkins, J M	Wellington	21 February 1986	Hayes, K J P	Wellington	21 February 1986
Baird, K M F	Wellington	21 February 1986	Hill, R G	Wellington	21 February 1986
Barclay, J C	Wellington	21 February 1986	Howden, J A	Wellington	21 February 1986
Barry, N A	Wellington	21 February 1986	Iversen, D E	Wellington	21 February 1986
Blair, A G	Wellington	21 February 1986	Jacob, H R	Wellington	21 February 1986
Boyd, S R	Wellington	21 February 1986	Karn, A M	Wellington	21 February 1986
Broad, M A	Wellington	20 June 1986	Kings, J	Wellington	21 February 1986
Caird, C C M	Wellington	21 February 1986	Krogulec, P St C	Wellington	21 February 1986
Clarke, G B	Whangarei	12 June 1986	Lakshman, K	Wellington	21 February 1986
Connell, C E	Wellington	21 February 1986	Lawes, W P L	Wellington	14 August 1986
D'ath, S	Wellington	21 February 1986	Levin, H D	Wellington	12 September 1986
Dickie, M J	Wellington	21 February 1986	Lim, W H	Wellington	21 February 1986
Dixon, S C	Wellington	21 February 1986	McPetrie-Clark, F J	Wellington	21 February 1986
Druce, T H	Wellington	12 September 1986	Maher, J M	Wellington	4 July 1986
Elliott, C L	Wellington	21 February 1986	Mokrzecki, S J	Wellington	21 February 1986
Fletcher, B J	Wellington	21 February 1986	Mullins, P D	Wellington	11 April 1986
Gault, A D	Wellington	12 September 1986	Murray, K C	Wellington	21 February 1986
Glengarry, J A	Wellington	21 February 1986	Paterson, A J D	Wellington	21 February 1986
Gray, A G	Wellington	21 February 1986	Peters, T J	Wellington	21 February 1986

The determination of indecency under the Indecent Publications Act: A need for a new criterion

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This article is a further consideration of the meaning of indecency in New Zealand law following the as yet unreported decision of the Court of Appeal in Howley v Lawrence Publishing Ltd. *The article is a further development of the questions raised by the author in his earlier article on this topic of the legal meaning of indecency at [1984] NZLJ 326. He suggests that a new definition is needed related to the concept of the portrayal of sexuality in a manner that endorses degradation as part of generally accepted community standards.*

It has been said that attempting to define "indecency" is attempting to define the indefinable. However in 1963 the New Zealand Legislature undertook the task of definition in s 2 of the Indecent Publications Act and provided that:

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

At first sight that definition may have appeared straighforward. However an interpretation of these crucial words by the majority of the Court of Appeal was not followed by a subsequent majority in the Full Court of the High Court and the judicial divergence meant that the correct meaning of "indecency" remained as elusive as ever. Now however the Court of Appeal in *Howley v Lawrence Publishing Ltd* (unreported, CA 77/84, 1 May 1986), has concluded the controversy by, in effect, departing from its earlier decision and adopting the view of the Full Court majority. Clarity may have now been achieved but it is submitted that an honest application of the test adopted by the Court of Appeal may not achieve an effective regime of censorship for the material falling under the purview of the Indecent Publications Act — this material including books, magazines, and, for the present, videotapes. Given the increasing public concern over the availability of pornography it is submitted that new legislative criteria may be needed to meet the community's concern.

Background to Howley's case

In *Police v News Media Ownership Ltd* [1975] 1 NZLR 610 the majority of the Court of Appeal, Richmond J and Moller J, argued, not unconvincingly, that the test for indecency in s 2 could include not only the legislative meaning but also the ordinary meaning of the word — so that the test for indecency could be satisfied if there was an affront to the commonly accepted standards of the community. In his dissenting opinion McCarthy P reasoned, not unconvincingly, that in matters of sex, horror, crime, cruelty, or violence it was necessary to show a "discernible" injury to the public good before the test of indecency was satisfied under the Act and that it was only in respect of any matters not listed in s 2 (such as religion or race) that the Court could adopt the test of community standards. However the extent of the disagreement between the majority and minority in this case was somewhat clouded by the concluding passage of the majority's Judgment. Richmond J concluded by postulating that:

> Whether one starts from the statutory definition or from the ordinary meaning of 'indecent' may make little difference in the end result as the Court must ultimately decide whether in the circumstances the public interest requires that the document be characterised as 'indecent'.

In the subsequent decision of Full Court of the High Court in *Waverley Publishing Co Ltd v Comptroller of Customs* [1980] 1 NZLR 631 Davison CJ seized upon this passage and argued that as the test of the "public interest" was little different from the test requiring an injury to the public good, this indicated that Richmond J had finally concluded that the statutory test was the one to be applied. Thus while Davison CJ in essence adopted the reasoning of the dissenting Judge McCarthy P, he also argued that it was possible to reconcile the apparently differing approaches in the Court of Appeal. Jeffries J did not plead for such a reconciliation. Jeffries J announced that he would either distinguish the majority decision or, if necessary, depart from it in favour of the approach propounded by McCarthy P. Thus only O'Regan J was prepared to adhere unquestioningly to the view expressed by the majority in the Court of Appeal.

The Judgments of Davison CJ and Jeffries J, which had for all practical purposes departed from the reasoning of the majority of the Court of Appeal, created considerable uncertainty as to the correct test to be applied for determining indecency whenever a document dealt with the subject matters listed in s 2 of the Act — ie sex, horror, crime, cruelty, or violence. As most documents which

were the subject of proceedings before the Indecent Publications Tribunal or the Court concerned those subject matters it was obvious that further clarification was needed from the Court of Appeal. This clarification came in the case of *Hawley v Lawrence Publishing City Ltd.*

Howley's case

The appellant, the Collector of Customs, considered that a collection of calendars displaying pictures of nude males was indecent and seized it pursuant to s 278 of the Customs Act. The respondent challenged this decision in the District Court and Judge Blackwood decided against the Collector of Customs on the grounds that there was nothing in the calendars which would be injurious to the public good. Thus faced with the divergence of judicial opinion Judge Blackwood chose the more liberal test of indecency which had been propounded by both McCarthy P in the *News Media Ownership* case the majority of the High Court in the *Waverley Publishing* case. There was an appeal to the High Court but in the light of the apparent conflict in the cases Thorp J removed the case into the Court of Appeal.

Whilst all five members of the Court were emphatic that it was not open to a District Court Judge to reject a view of the law which had been previously adopted by a majority of the Court of Appeal, a majority of three Judges in this case (Woodhouse P, Richardson J and McMullin J) also agreed that the only test for indecency was whether publication of the material would be injurious to the public good. The two dissenting Judges (Cooke J and Somers J) based their separate dissenting Judgments primarily on the demands of stare decisis. Cooke J felt there had been insufficient argument from counsel on the consequences of departure from the doctrine of stare decisis in this area of law to justify abandoning the test for the previous majority, and Somers J similarly stated that there was no argument advanced as to why the issue should be reopened.

The question of the extent to which the Court of Appeal could review an earlier decision of its own was fully addressed by both Richardson J and McMullin J; but for the purposes of this article our attention will focus on the substantive points made by the majority.

Firstly it can be noted that on the substantive point there is a slight difference in emphasis between the Judgment of Woodhouse P (with which Richardson J expressed his agreement) and that of McMullin J. Although in his dissent Somers J maintained that there was a "real difference" between the views of the majority and the minority in the *New Media* case, McMullin J stated with some firmness that the differences may be "more illusory than real". Thus McMullin J felt there was much to be said for the attempt of Davison CJ in the *Waverley Publishing* case to reconcile the two approaches upon the basis of Richmond J's concluding passage. His Honour argued that:

> To ask whether the public interest requires that the document be treated as indecent seems much the same as to ask whether the document is injurious to the public good (at p 626).

Woodhouse P was also happy to accept that the view of Davison CJ "may well be correct". In support of this view Woodhouse P noted the passage in the *News Media* case where Richmond J had referred to the ordinary meaning of the word 'indecent' as merely a "starting point" for the Court's "initial approach" to the question. (However, as Somers J noted in his dissent, Richmond J described the approach as "initial" only because the statute required the court to have regard to the statutory criteria listed in s 11). Indeed Woodhouse P did seem ready to concede that Richmond J may have intended a lesser test in relation to material dealing with s 2 matters and to that extent he expressed his open disagreement with the earlier Judgment. Furthermore Woodhouse J indicated, obiter dicta, that even material outside the s 2 matters — such as race or religion — could only be declared indecent if it met the test of being injurious to the public good.

As it seems probable that it will be the Judgment of Woodhouse P which will be cited in the future by the Courts and Indecent Publications Tribunals we need to examine more closely the test propounded therein. And perhaps the most striking feature of the Judgment is the insistence that the statutory test requires "actual harm" to be established. For example Woodhouse P at one point observed:

> ...the statutory concept requires demonstration that any relevant material has a capacity for some actual harm in order to justify the contemplated censorship

At another point in his Judgment his Honour argued that in view of the history and liberalising intent of the Act, "pernicious" material only satisfied the test of indecency when it reached "a level" of being injurious to the public good. Similarly Woodhouse P took the opportunity of affirming as correct his opinion expressed in the Supreme Court decision of *Robson v Hicks Smith Ltd* [1965] NZLR 1113, 1123 to the effect that:

> ...there is a need to find a corrosive or actively harmful tendency which is the real justification for restricting or banning material of this kind.

The problem

Prior to *Howley's* case it was possible to argue that material which offended community standards could be regarded as contrary to the public interest, and by reason of that fact be injurious to the public good. However all the formulae of Woodhouse P cited above would seem to suggest that pernicious material can no longer be subjected to censorship merely because it shocks or offends — unless it can be additionally shown that the distribution of that material would involve some discernible, actual injury to the public. But a problem with this approach is that the more recent scientific studies which have been conducted into the relationship between published material popularly known as "pornography" and consequent sexual behaviour have, at best, reached inconclusive results.

Moreover, as will be discussed below, the major studies which were undertaken in the 1970s seemed to indicate more positively that sexual material had little, if any, effect on the behaviour of those exposed to it. In brief these comprehensive studies conducted in the USA, Denmark and the United Kingdom seemed to suggest that whilst pornography may be offensive to some citizens it was not possible to show that it was harmful to the public. Indeed it would seem that the predominant

body of scientific opinion still clearly supports the view that pornography is harmless — in the sense that it will not cause anti-social behaviour on the part of those exposed to it.

Thus if scientific opinion is to be heeded, as it surely must, it would seem that a great deal of material dealing with the subject matter of sex which is presently classified as "indecent" in New Zealand, is in fact falling short of the Court of Appeal's requirement that there be demonstrated "a capacity for some actual harm in order to justify the contemplated censorship" (per Woodhouse J). The question must arise whether some new statutory criteria for censorship are not now needed.

Scientific Research

In view of the Court of Appeal's decision it is interesting to consider in some detail the findings of these various reports examining the extent of the harm caused by exposure to pornography.

Firstly there is the well-known decision of the Danish Parliament made in 1969 to remove virtually all restrictions on the distribution of erotic material. After a most thorough investigation the Parliament had acted upon a report of the Danish Medical Council. This report had concluded:

> The Council have no knowledge of scientific research which can be taken as proof that the reading of [erotica or pornography], either by adults or children, contributes to the infringements of the Penal Code by the parties in question... As far as adult individuals are concerned there are no bases for assuming any detrimental influence thererfrom, either on the development of the person's mind or on their attitude to sexual activity

Secondly there is the equally celebrated report in the USA of the Presidential Committee on Obscenity and Censorship (1970). The Commission was created by Congress to recommend the legal means of protecting the USA from the perceived threat of pornography. Instead, after considerable research, the Commission called for the repeal of the law controlling pornography. (President Nixon rejected this call as "morally bankrupt"). In its report the Commission had concluded:

> Empirical research designed to clarify the question has found no reliable evidence to date that exposure to explicit sexual materials plays a significant role in the causation of delinquency or criminal behaviour among youth or adults. The Commission cannot conclude that exposure to erotic materials is a factor in the causation of sex crime or sexual delinquency

Turning to the United Kingdom there were similar findings by scientific teams. In 1969 an Arts Council Working Party concluded there was no evidence that the result of reading pornographic works "would be injurious to society". Even the research team commissioned by the Longford Committee Investigating Pornography (which in 1972 argued the case for increased censorship) failed to find any causal link between exposure to pornography and anti-social behaviour. This caused members of Lord Longford's committee to dissociate themselves from their own research team. Finally the Home Office Committee on Obscenity and Censorship (the Williams Committee) reported in 1979 that written word should be neither restricted nor prohibited because on the evidence available to the Committee the written word was not capable of causing harm. It can be noted, however, that the Indecent Publications Tribunal has specifically rejected that conclusion and stated "[w]e find expressly to the contrary" (see *Decision 1083*). Unfortunately no research was cited to support this finding of the Tribunal.

Before we examine the Tribunals recent decisions in a little more detail two warning notes must be sounded about the conclusions of the above reports. Firstly they were, in the main, conducted before the contemporary emphasis on the violent, aggressive depiction of sexuality began to dominate the market. The research in the 1960s and 1970s tended to concentrate upon the portrayal of non-aggressive themes (see Sir Martin Roth "Pornography and society: a psychiatric view". This article is one of a series of valuable studies on pornography found in the book *The Influence of Pornography on Behaviour* (ed Yaffe and Nelson), Academic Press, London, 1981).

Secondly it is important to note that, as the Williams Committee reported, there may arguably be some discernible harm arising from the viewing of films. Similarly some recent research appears to argue a causal link between television violence and undesirable social behaviour and attitudes. However it is clear from the reports cited above that exposure to the written word does not have these adverse social effects and on this point there appears to be no challenge from the more recent research.

As the Indecent Publications Tribunal is substantially concerned with the classification of the written word, there would thus appear to be considerable problems with a statutory criterion which imposes as a prerequisite discernible, actual injury to the public good. We therefore turn to examine briefly the Tribunal's attitude to its task.

The Tribunal's approach

This writer has previously noted that

> [t]he tribunal frequently purports to find some injury to the public good (often on the basis of a likelihood to corrupt under section 2(e) but rarely do the decisions reveal the basis for such findings. ([1984] NZLJ 326).

It was similarly noted that although the finding of the likelihood of corruption is frequently made by the Tribunal, it has itself observed the difficulty in making such a finding ...because of the intangible nature of the danger with which we are dealing (see *Re "How To Make Love To A Single Woman"* (1981) 2 NZAR 559, 560).

A survey of the Tribunal's more recent decisions would indicate that those observations still hold true. For instance in *Decision 3/86* the Tribunal classified magazines as indecent upon the basis that they were "grossly injurious to the public good". The magazines depicted masturbation, gave maximum exposure to the genitals, and depicted males in homosexual activities but the tribunal did not further explicate as to how such depictions would cause actual, discernible injury. In *Decision 4/86* the Tribunal found it unlikely that adult readers would be "corrupted" by reading either "The Sex Maniacs Cookbook" or "Ann Summers Very Own Picture Book of Sexy Cocktails" and this was

proffered as a reason for declaring them not indecent in the hands of persons over 18 years old. The implication was, of course, that other reading matter could certainly corrupt and thereby warrant a classification of indecency.

However the Tribunal has yet to cite the evidence suggesting that reading books or magazines can corrupt a person. *In Re Penthouse* (1984) 4 NZAR 259 the Tribunal did suggest that overseas Courts are reluctant to accept expert evidence on the issue of whether a publication has a tendency to corrupt, but such Courts are interpreting different statutory provisions. In New Zealand s 6 of the Indecent Publications Act would clearly seem to allow expert evidence. Indeed in *Re the Playbook for Kids About Sex* (1985) 2 NZAR 43 the Tribunal itself did not hesitate to elicit and cite the opinions of a psychiatrist and a psychologist on the nature and effect of the publication. Similarly in *Howley's* case the District Court Judge cited the opinion of an expert who had spent much time researching the effects of pornography in countries where explicit sexual material was widely available. That particular expert, Dr. Colgan, apparently concluded that the overall effect of calendars portraying male nudes was "likely to be more beneficial than harmful". Such a conclusion is consistent with all the various studies arguing the "harmlessness" of the non-violent portrayal of sex.

In 1984 this writer suggested that the test which was being adopted by the Tribunal, in practice if not in theory, was that of offence to community standards. This would still seem to be the position. For instance when in *Decision 1/86* and *Decision 2/86* publications were declared indecent primarily upon the ground that they were designed only to "attract the attention of the prurient" there was no suggestion made that this appeal to the prurient ipso facto causes demonstrable harm. A factor such as an "appeal to the prurient" relies much more on ordinary meaning of indecency and the test of community standards than on the statutory test of injury to the public good. One therefore wonders if in the light of *Howley's* case some new legislative criteria are not needed — if for no other reason than to validate the adoption of a factor such as an "appeal to the prurient".

The rationale for new statutory criteria

When the Tribunal makes its findings that publications dealing with homosexual activities are "injurious to the public good", one can understand the rationale. For rightly or wrongly statute has declared homosexual activity to be a criminal offence; and thus a magazine or publication which explicitly or implicitly supports indulgence in criminal behaviour can fairly be regarded as "injurious to the public good". (Of course the position regarding publications for the homosexual market will be quite different if homosexual behaviour is decriminalised.)

However publications which depict heterosexual or lesbian activity between consenting adults fall into a different category. Such publications do not depict or advocate the committing of a criminal offence. The publications are frequently classified as indecent but one struggles to see how they can be properly regarded as "injurious to the public good" — for they can not be demonstrated to possess "a capacity for actual harm". To repeat, with respect to books and magazines there seems to be no reliable evidence available suggesting that the portrayal of sexuality in a non-violent manner has adverse behavioural effects on a reader; and even with the portrayal of sexuality in a violent context the evidence of adverse effects is scant and conflicting.

Thus given the empirical evidence against the *harm* of pornography one wonders if the statutory criteria for censorship should not focus on the *offensiveness* of pornography. And in formulating such new criteria the perspective on pornography now provided by the women's movements may be of considerable assistance.

The offensiveness of pornography

Perhaps the most interesting recent development in the censorship debate has been the increased interest shown by women's groups in the issue. D H Lawrence once described pornography as an attempt to "do dirt" on sex; many women now view pornography as an attempt to "do dirt" on women. A recent commentator, Maryann Ayim, put it this way:

> We must understand pornography not as openness with regard to sexuality but as hatred and systemic devaluation of women.[1]

Similarly the Canadian Committee on Justice reflected the women's view of this issue in its Report on Pornography in 1978. It stated:

> The material is exploitive of women — they are portrayed as passive victims who derive limitless pleasure from inflicted pain, and from subjugation to acts of violence, humiliation, and degradation. Women are depicted as sexual objects whose only redeeming features are their genital and erotic zones which are prominently displayed in minute detail.... The effect of this type of material is to reinforce male-female stereotypes to the detriment of both sexes. It attempts to make degradation, humiliation, victimization (sic, and violence in human relations appear normal and acceptable (as quoted by the Court in *R v Red Hot Video Ltd* (1984) 6 CRR 169 at 181).

The violence in current pornography which is emphasised by the Canadian Committee is a phenomenon not evident in the past (see *The Influence of Pornography on Behaviour* (ed Yaffe and Nelson), Academic Press, London, 1981), and this can only mean that the fantasies of todays consumers of pornography increasingly involve the subjugation and degradation of women. Such fantasies can not be shown to cause actual harm but the availability of such fantasy-provoking material is obviously offensive to many women and men.

Already in New Zealand Judge Dalmer is reported as having banned a videotape under the Indecent Publications Act on the basis that "the tape both degrades and debases women".[2] One may sympathise with that sentiment but again the problem is that such a tape can not be shown to cause actual, discernible harm.

New Criteria?

Obviously there must be some caution in the enactment of provisions restricting free expression — particularly if a Bill of Rights were to be passed — but s 9A of the Race Relations Act 1971 already provides a philosophical precedent, if one were needed, to justify the enactment of

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The LLB degree course:
Some observations by a "young", yet "not so young" graduate

By Peter de Bres, BDiv (Utrecht), MA (Auckland), LLB (Canterbury)

In this article the author, former senior lecturer in social anthropology and Maori language, comments on the Canterbury Law course. Mr de Bres is at present coordinator (honorary) of the newly established welfare rights unit at the Community Law Centre in Christchurch. He was born in Holland 71 years ago, and came to New Zealand in 1954.

Introduction

In May 1986 I was awarded the LLB degree. Hence, I am only a "young" graduate. Yet "not so young" as I first enrolled as an undergraduate at a university in 1935.

My interest in Law was triggered off by two different experiences. Firstly, when I read for a post-graduate course in social anthropology in the mid-sixties, one of the papers was concerned with law and custom in non-literate societies. Secondly, for a considerable part of my career, I have had to deal with community issues which frequently brought me in contact with the legal profession.

The study for the LLB degree has raised in my mind a number of questions, which I would like to share with the readers of the *Law Journal*. I propose to make first four general comments on the course and then discuss some specific issues with particular reference to those students for whom English is a second language. I shall conclude with some desiderata regarding law courses in present-day society, a kind of "cri de coeur".

Workload

My first general comment is about the volume of work involved in the law course. Expressed in "points", as our Canterbury system works, it is one and a half times an arts degree. Moreover while a full arts paper carries a degree value of twelve points and a law paper only eight, as regards the volume of work, the eight points law units are, in fact, in several cases more demanding than twelve points arts. As the average student enrolls for at least five full papers, the annual workload is enormous. If we assume

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criteria which are based more firmly on tests of acceptable community standards and the avoidance of offence.

A specific aim of any new criteria dealing with the portrayal of sexuality should be to prohibit the distribution of any material which in its portrayal of sexuality endorses degradation. In the United Kingdom the Video Recordings Act 1984 specifically lists examples of such degradation. However a more general formula might prove more workable. Thus without attempting a precise definition here one could envisage a definition of indecency which specifically encompasses "the depiction of human beings in a degrading sexual context, in a manner which lacks artistic merit or social value".

Such a definition would cover the violent "hard-core" pornography. For the "soft-core" pornography and non-sexual topics one would be seeking a general criterion which is considerably less ambiguous than the present one of "injury to the public good". Here the criteria of s 24 of the Broadcasting Act 1976 may be of assistance. Section 24 of the Act simply provides for the maintenance of standards which will be "generally acceptable in the community" and it provides that the Corporation shall have regard, inter alia, to "the observance of standards of good taste and decency". This formula would obviously need to be rephrased for the purposes of inclusion in definition section of the Indecent Publications Act, but it is submitted that the community standards test would provide a more honest and workable formula than the one we presently have.

The "community standards" test would inevitably be criticised as too subjective. It must be remembered, however, that in the absence of any firm evidence suggesting that pornography causes harm, the Tribunal is presently making that same subjective assessment on whether a publication causes injury to the public good. We have in truth always relied upon the sound Judgment of the Tribunal as to current community standards, and it is time for this truth to be made the statutory test. □

1 "Pornography and Sexism: A thread in the web" (1985) 23 Western Ontario Law Review 189. A thorough feminist analysis of pornography is provided by Andrea Dworkin in "Pornography: Men Possessing Women", Womens Press, London, 1981. (For a somewhat different feminist view see Athina Tsoulis "Pornography and Censorship" published in the April issue of Broadsheet).

2 As reported in "The Christchurch Star" May 15 at p2. In Canada a treatment of sex which dehumanises and degrades is likely to fall within the statutory definition of obscenity contained in their Criminal Code — see the decision of the Supreme Court of Canada in *Towne Cinema Theatres v The Queen* (1985) 3 CCC 193.

3 But evidence of community standards would be admissible — on this point see the discussion by members of the Supreme Court of Canada in *Town Cinema Theatres v The Queen* ibid. (The Judgments of Laskin C J C and Wilson J in this case also provide interesting analyses of the concept of "community standards of tolerance".)

that all areas of law, covered in the compulsory papers, are essential for any future career in law, one wonders whether the degree course should not be extended by another year. The graduate would be more mature and better equipped to share in the tremendous responsibility the legal profession has in our society. The law student would still complete the degree in one year less than his medical colleague! As this could cause undue hardship for students, provisions would be required in order to prevent the study of law becoming a class privilege.

One could go further and validly argue that the LLB should be a post-graduate degree, but this would no doubt meet with even stronger objections than a possible extension of the training.

Purpose

A second comment concerns the purpose of the law degree within the framework of university education. One may suggest that its purpose is the preparation for a future career, yet many will contend that it aims at more than vocational training. The professional course is more concerned with the latter and particularly the period of apprenticeship in a law office. That is, if practising law as a barrister and solicitor is the graduate's aim. The university course is primarily concerned with the principles and theoretical aspects of the various facets of the law whether this is taxation, contract, company or whatever other branch of the law may be studied. It must include training in legal reasoning, the development of a student's ability to think legally and of his capacity for articulate expression both written and spoken. J F Northey discussed these issues in "Legal education and the Universities" [1962] NZLJ 9 23. He added that legal education "means the production of men who are educated in the most general sense". This is important as an exclusive focus on law is bound to narrow one's mind.

Career options

Thirdly, I have no statistical evidence to prove the point, but my impression is that not more than half of the law students eventually land up in a law practice. The others will assume different responsibilities in society, depending on their particular interests. It is important to remember this whenever the design of a law course is discussed. The introduction of special topics like welfare, civil liberties, international law and the like has increased the "liberal" content of the course and broadened its scope. That the link between a general liberal education and the training for a legal career has not always been seen, is proved by the simple fact that at the time of the establishment of the University of New Zealand, no provision was made for the teaching of law. At that time the qualifications of a law practitioner were acquired by means of an apprenticeship. Even after the 1882 Act, concerned with Legal Education, there were still two modes of entering the profession. Firstly, by passing such an examination as may be prescribed by the Judges and secondly, by taking a LLB degree at the University of New Zealand. It was not until 1929 that the LLB became a prerequisite for the right to practise as a barrister and solicitor.

Those who have opted for careers other than with law firms are found in the world of commerce, in government departments and also in the "helping professions". For many of these positions legal training is of great assistance. Then there is the important area of politics. Sir John Marshall wrote in "The Lawyer's responsibility to society" [1975] NZLJ 733:

> For those who have the urge, there is the fascinating attraction of being involved in the processes of government, of helping to shape the course of events, of trying to resist or delay or divert mistaken politics, of promoting new ideas, of initiating or supporting development and reform.
>
> And further:
>
> In many legislatures in the free world lawyers tend to be the predominant element. Their training and experience fits them for law making and for administration, and for the parliamentary debating chamber.

In our present society, there is tremendous scope for students with a law degree, particularly if combined with sufficient training in the arts, to broaden their understanding of society. However, it seems to be frustrating that a legally trained person, who works in an area closely related to the law, is not considered as of equal status with the practising lawyer and therefore feels him or herself a "second class citizen".

Teaching law

A fourth observation is about the approach to teaching. It is only natural that during a course of this type, comprising many aspects of law, the various lecturers have different approaches, often determined by their own particular gifts and preferences. As my own criterion of assessment of a lecturer's performance has been the contents, particularly the academic standard, rather than the approach or presentation, I have been satisfied with the course I attended. However, I found one approach particularly interesting, the so-called "socratic method". The method was allegedly initiated by the Greek philosopher Socrates, but its origin is uncertain (R O McGechan, "Law teaching overseas" (1951) 27 NZLJ 361).

This method involves a dialogue between the lecturer and student(s). Anything a student says is pursued to its logical consequences, especially its logical absurdity. It implies that cases must be studied prior to the lectures. The class discussion aims at the deduction of rules and principles from these cases.

T K Sidey, in "Legal education" (1929) 5 NZLJ 48, an article about the "case method" (the alternative description of the socratic method) made special reference to the "Harvard system".

> This method of teaching law, which has been approved by experience and which is now employed in the leading law schools of the country, has the threefold merit of enabling the student to acquire a thorough and practical knowledge of legal principles; to develop the power of independent legal reasoning and to become familiar with those processes of legal thinking, which have determined the form and character of our jurisprudence and which will govern the future development.

This seems to sum it up well.

I found the approach interesting,

challenging, but also exhausting and do appreciate that some students felt nervous about it. I could see the problem of my young Asian friend, who speaks Chinese at home, had his secondary education in Malay and was expected to answer promptly in English.

Language, memory and education

Language and the law course

When I first approached the Law Faculty about taking the law course, I asked a senior member of the law faculty: "Are there any particular qualities one must possess in order to successfully complete a law degree?" The reply was: "The most important thing is an analytical mind." Assuming that I could meet this requirement, I decided to give it a go. After having started and now having completed the degree, I suggest that there are two aspects of the study of law which are of equal importance. The first is a good memory, the second, competence in language. I propose to discuss the latter first.

The study of law is very much a matter of semantics. The legal student must have the ability to define concepts and be articulate in speech and writing. Lord Denning has emphasised that the good command of language is a first prerequisite of the legal profession. Says Denning in "Command of language" (1979) *The discipline of Law* Butterworth London, "To succeed in the profession of Law, you must seek to cultivate command of language. Words are the lawyer's tools of trade." From the literature, it appears that deficient knowledge of English, has been a concern of examiners for a long time. H F von Haast wrote, in "Legal education" (1925) 1 NZLJ 62:

> At every meeting of law examiners, there is the same complaint that a large proportion of the candidates cannot write, spell or express themselves in decent English. They ought to be failed for their illiteracy.

Sidey (see reference above, on p 53) suggested that "there should be a greater obligation on the student than there is at present to study English, and in particular English composition".

As English is also my second language, I have been much aware of this problem. If one would pursue student records, one is likely to find that students with a non-English background have encountered particular difficulties in this area and not infrequently have dropped out. To what extent lecturers should take account of this problem is debatable.

I do appreciate that the highest possible academic standard should be maintained for those who have ambition to practise law in this country. However, a special problem arises in respect of non-native speakers who have come across from overseas to take a New Zealand law degree, especially students from the Pacific and Asian countries. Should it be taken into account that English is the student's second language? The point is that they will conduct their legal business largely in their native tongue. This to me is a pertinent point.

I am personally acquainted with the home background of a number of these students. I think particularly of one or two of them, who were born and grew up in a "long house" deep in the jungle of Sarawak. When I saw this environment I began to wonder however parents could have acquired the vision of their children attaining degrees from Western universities. To achieve it, they were willing to sacrifice everything for this education. In one instance, a father worked for many years double shifts in the rubber plantations, which was a major contributory cause of his early death. As regards these students, some leniency should be warranted. It may be one way of exercising our responsibility towards the younger nations.

Nevertheless, students with limited knowledge of English are well advised to include a language course as part of their arts requirement before entering the law school.

The law course and memory

In his book *Learning the Law* ((1982) Stevens & Sons, 48), Glanville Williams writes:

> What the practitioner needs is a grasp of general legal principles, a sound knowledge of practice and procedure, an ability to argue and a general knowledge of where to find the law he wants. But it is not essential for him — though of course it is a great help — to carry much law in his mind.

Casey J endorsed this when he said in *Forum on legal education (1970) Proceedings Legal Research Foundation,* School of Law, Auckland:

> The successful lawyer need know very little law, but what he must develop is a mature sense of judgment.

Even stronger are the words attributed to Lord Halsbury: "God forbid that I should know all the Law."

As a more senior student, I found memorizing facts a real problem. I cannot assess the importance of remembering detailed facts from the point of view of the practising lawyer, but rather than knowing so many facts it seems to me that it is far more important to know your way in statutes, textbooks, reference and case books and law reports.

This leads me to the next issue.

Examinations

I must admit that I have never been a good examination candidate, though at times I may have achieved higher grades. What I got out of university courses was that it stimulated me to read widely, extending myself beyond the examination material. I found it rewarding to spend time on assignments which required research and accepted, somewhat resentfully, that I had to sit examinations and pass them in order to get on with the next part of the course. During my university career as a lecturer I have often wondered what other methods could be satisfactorily applied to test a student's ability, knowledge and particularly the theoretical understanding of the subject.

In the Canterbury course, the assessment is virtually solely based on examinations: midsessional (25%) and finals (75%).

Are there any alternatives? If we review the whole area we may isolate three different methods of assessment. Firstly, the all-written examination, a method very common in New Zealand and, as mentioned already, common practice in the Canterbury law faculty. The only exception is the "viva voce" in cases where an oral

test is considered just. The written examinations may be subdivided into two subcategories: open book and closed book. Most lecturers seem to prefer closed book examinations. They consider these in the interest of the students as allegedly pass rates have proved. I appreciate this consideration, though I personally prefer the open book method. Not only because it was less taxing on my memory, but, more particularly, because I found that the preparation for an open book examination provided one has found the right method, helps the student to retain the material better and is therefore more advantageous in the long term. Material, crammed in within a short period before the exams is easily forgotten.

As far as closed book examinations are concerned, much depends on hints given beforehand. Most lecturers will give an indication of what can be expected, but as a rule only in general terms. Personally, when I had to set examination papers, I have always been specific in my information and at times read out the question in full. I told the students that I expected a high standard of performance.

A second approach is written assignments based on personal research. However, the problem is how to establish that it is the student's own effort. It is not practicable to give each student an individual topic. Yet, my own preference would be to have more emphasis placed on this method. The problem of possible dishonesty could be checked by an in depth interview, which should give sufficient evidence of the true knowledge of the student. No doubt already hard worked and at times overcommitted staff, would raise the objection that this method could only be implemented if the staff-student ratio was improved.

Thirdly, the oral approach. When I sat my first university exams I was submitted to two tests. The first took place in the teacher's office and could last up to one hour. The student was interrogated in depth about the lecture material and compulsory text books. It was quite amazing what a skilled teacher could achieve within that time. If the result was satisfactory, a student would be given a "pars" to study in great detail and prepare him or herself for a "learned discussion" on the subject matter before the whole faculty. Other teachers could take part in the questioning if they so desired. This test would take only 15 minutes, certainly enough for this kind of nerve wracking experience. The formality of the latter test (sometimes of the first also) was expressed by the fact that the student had to appear in "tails"!

I would not recommend such a high pressure oral method, but believe that the alternative of an oral examination could be more prominent than the case is now with the sparsely applied *viva voce* system. I believe that the point can be made that students belonging to ethnic groups with a strong oral tradition eg Polynesians, would perform better in oral tests. Of course, other students too may have difficulties with written examinations. A system where one method complements the other would therefore be helpful.

Once again, I refer to my Pacific Island and Asian friends, with whom I have a lot of empathy. One may be able to speak English fluently, write reasonably good idiomatic English, but when one sits in an examination room and works under great pressure having to express oneself articulately in a second language within a limited space of time, additional problems arise. I understand that at an Auckland based theological college non-native speakers of English are given half an hour extra to relieve some of the stress.

Much more could be said about the examination system. R M Algie once summarised it very neatly, in "Legal education" (1925) 1 NZLJ 48:

> I am attacking the system under which they (ie students) are forced to work. It is a system which makes the examination the only goal, which offers no special inducements to a man to study his law for its own sake, and which in fact tends to concentrate his attention solely upon a process of unintelligent cramming for those examinations.

Desiderata

In this section I propose to refer to two issues concerning the LLB degree course, which, I believe, need special attention: monoculturalism and the opportunity to sit "specials".

Monoculturalism

The course as it was offered in Canterbury during my years of study was entirely monocultural. This seems strange in our multi-ethnic society. Even more so as the educational system in New Zealand is gradually moving to a bi-cultural and eventually to a mutlicultural approach at primary and secondary school levels. The most obvious first step as regards law courses is the introduction of Maori Land law at all universities where the LLB is offered. So far, by my knowledge, it is only available at Victoria University and in Auckland.

It goes without question that Maori Land is a most important issue in our country. The Treaty of Waitangi as a legal document and the numerous acts concerning land passed since the 1840-ies are very much a focus of contemporary debate. In my opinion, a lawyer can play an important role in thinking through these land issues. Moreover, it is not unusual that Maoris approach the legal profession about land problems.

One may, however, go a step further, as Auckland has done, by introducing a course in Pacific Legal Studies.

As a third step I would like to see an optional course in Islamic Law. In all law schools of our country one finds students from officially Muslim countries, particularly from Malaysia, which is an Islamic state. However, I am fully aware of the fact that the majority of the Malaysian students are Chinese, Indians or come from tribal societies in Sarawak. Only a few of the students are Malay and practising Muslims. The Muslim majority in Malaysia is undergoing a phase of resurgence as in many other Islamic countries. We are made aware of this even in our country as an increasing number of Malaysian students wear Muslim attire. One of the most fascinating, yet to some a threatening aspect of this revival is the role of shari'a, Muslim law. The question arises to what extent efforts will be made to impose shari'a on non-Muslim citizens. There are pressures to expand the role of shari'a Courts from the personal and private

domain to public and criminal justice. The Qur'an has set the uttermost fence by providing for penalties like flogging, stoning and amputation. Only extremists would suggest literal application of these provisions. The general trend is to adjust this to a new age by way of analogy and consensus. It is contended that Islamic justice would contribute to a new and better society, built on greater equality of all citizens, as shari'a addresses itself to economic questions, to ownership, taxation, banking, the distribution of wealth etc. It is held that it would reduce the crime rate as the Qur'an requires adhering to a strict moral code and bans on alcohol, drugs and nightclubs are corrective measures.

The study of this aspect of their own society is important for the overseas student and something they can identify with, but it is also important to us to gain a better understanding of our Asian neighbours and their societies.

Failure

Unfortunately one of the hazards of student life is that he or she sometimes fails, an unpleasant experience for lecturer and student alike. I know from my own experience of staff meetings at the end of the year how reluctant lecturers are to fail a student. For the student it is of course worse. There are many different reasons why students fail. The student may not be university material and should be told to consider a different type of tertiary education. Has the student put in enough work? Are there any specific reasons why his or her performance was unsatisfactory? Did the student take on too much? Does the student have health problems? Has the student suffered bereavement? These are the kind of questions one may consider. In some instances an "aegrotat" may solve the problem or the faculty may consider a compassionate pass. As we have already mentioned, the law faculty has provision for a "viva voce". But not all failures can be saved.

I have always believed that an opportunity to sit a "special" has much to recommend it. The Canterbury law school does not provide for this. I understand that it has been tried elsewhere but dropped again as students abused the system by, say, working hard for four papers and counting for the fifth on a "special" after the long vacation. A "special" could perhaps be granted on a selective basis, following an interview with the lecturer concerned. Every year there seem to be some final year students who miss a last paper. If they are from overseas, they have to stay for a whole year. This often means considerable financial hardship. If they are conscientious students, who have made a real effort and have a reasonable academic record, it would seem only just that they be given the opportunity to sit a "special" before the new academic year starts. The overseas student is the most obvious example of this need, but it should not be restricted to that category.

Summary and Conclusion

Looking at the degree course in retrospect I feel that there are a number of old issues which require on going attention and new ones which should be considered. These are, in summary, the questions that came to my mind while studying for the LLB.

(1) Does the teaching help the student sufficiently to come to grips with the guiding principles of jurisprudence and to learn to think independently and creatively? It has been suggested that "too many undergraduates come to the university not to read for a degree, but to be lectured into one" (Lord Eustace Percy).

(2) Does the law course as it is designed meet the requirements of the legal profession in our complex society, taking into account that legally trained persons are employed in many different areas?

(3) While acknowledging the necessity to uphold high academic standards, is some "affirmative action" warranted in respect of non-native English speakers with particular reference to overseas students?

(4) Are our traditional examination methods still satisfactory in the multi-ethnic university environment?

(5) Should greater emphasis be placed on a multi-cultural approach rather than adhere to the traditional monocultural design of the courses?

In conclusion, I must say that I have learned a great deal by taking this course. I have enjoyed the lecture and the tutorial discussions. I have appreciated the way the younger student accepts the older one. I have learned much about language by reading Judgments of great Judges and by listening to the skilful use of language by the teachers. I have shared study groups and social occasions with overseas students, a number of whom have become close family friends. I have taken part in their study groups, through which I have experienced opportunities of mutual learning. To me the course was not a first step towards a career, but an exercise in continuing learning, which has brought a new dimension to my university education and given me a new perspective on society. □

Recent Admissions

Raizis, S	Wellington	21 February 1986
Sarfati, P M	Wellington	21 February 1986
Scott, S M	Wellington	21 February 1986
Simons, S J	Wellington	21 February 1986
Stevens, E	Wellington	21 February 1986
Stevens, R J	Wellington	21 February 1986
Sutcliffe, D J	Auckland	29 August 1986
Tapaitau, T	Auckland	20 June 1986
Taylor, N C	Wellington	21 March 1986
Taylor, P E	Wellington	21 February 1986
Thomson, K C	Wellington	21 February 1986
Traves, G P	Wellington	21 February 1986
Vodanovich, S G	Wellington	21 February 1986
Vuataki, K	Wellington	21 February 1986
Whyte, S D	Wellington	21 February 1986
Wilson, A H	Wellington	21 February 1986

Franchising and the Commerce Act 1986 (I)

By Ian Eagles, Associate Professor, Department of Accountancy, University of Auckland

The recently passed Commerce Act will have substantial effects on a number of different areas of Commercial Law. In this article and the one to follow it next month Ian Eagles looks at the topic of franchising as it is affected by the new legislation. In this article he considers in particular the restrictive practice problems that can arise, competition, price fixing, and the question of prior authorisations. In the next article he will consider franchising practices that are at risk.

Franchisors may have heaved a collective sigh of relief at the dropping from the Commerce Act 1986 of its predecessor's express proscriptions in ss 50 and 23(1) Commerce Act 1975 against product forcing and refusals to deal, practices which so often provide a franchisor with its only workable sanctions. They may also have breathed more easily at the omission from legislation so closely modelled on the Australian Trade Practices Act 1974 of the latter's finely meshed prohibitions against exclusive dealing (in s 47) and discriminatory pricing (s 49). Franchisors would do well not to be over-jubilant. What the 1986 Act loses in precision it more than makes up for in breadth of coverage. Franchising must now be conducted by methods which neither substantially lessen competition nor allow either party to abuse their market power. The precision of the former Act was in any event illusory. Its replacement contains none of the wait-and-see enforcement governed by tests of reasonableness and the public interest which characterised the 1975 statute. The promotion of competition is no longer one *desideratum* among many. It is the statute's whole touchstone. Franchisors cannot even take much comfort from the recent *Report* by the Commerce Commission to the Minister of Trade and Industry on *Motor Vehicle Franchise Agreements*. The Commission did, it is true, aver that franchises were not inherently anti-competitive. As against this, they were strongly critical of some clauses, commonly found in franchise agreements. While the Commission's inquiry may have been conducted under the 1975 Act their Report contains more than a hint of what is in store for franchisors under Part II of the 1986 Act.

One characteristic which the Commerce Act 1986 does have in common with both its predecessor and its trans-Tasman doppelganger is the absence of any special regime for franchises. Part II makes no distinction between franchise arrangements and the practices of wholly independent traders while the merger and takeover provisions in Part V have no application to, what in law, is nothing but a series of interlocking contracts not a legal entity. A franchise system may be of a size and cohesion to rival the largest conglomerate and yet be accorded no more legal recognition than the most ephemeral joint venture. Franchises are unique among ways of doing business in that the glue which holds them together is often by its very nature anti-competitive. This is likely to have several unfortunate consequences.

Those locked out of the franchise system may seek to use the Commerce Act 1986 to defuse that system's threat to their own activities. Competition law may thus successfully be used to hobble competition. Franchisors and franchisees who enter on their joint enterprise with excessively high hopes may resort to competition rules to deliver those hopes in the teeth of their contractual obligations. The use of competition law to rewrite an unfair or onerous franchise agreement is a well attested phenomenon in the United States and it would be surprising if the Commerce Act were not to be used in the same fashion (especially now that it allows the weapons of injunction and damages to be wielded by private hands). Unlike many restrictive trade practices, which are coercive from the outset and seen to be so, the restrictions contained in a franchise agreement are irksome only when it becomes apparent that they transfer to the other party profits which the franchisee has come to regard as a tribute to its own enterprise and acumen rather than as the legitimate fee for the right to enter a money making system (which is no doubt how matters were conceived at the inception of the franchise). As the Commerce Commission pointed out in the *Motor Vehicle Franchise Agreements Report,* an agreement may be one sided or unfair without being anti-competitive.

A The nature of a franchise

The term "franchising" describes a wide spectrum of business activity. Definitions are elusive precisely because the law has in most cases no need for them, for instance in the absence of express contractual stipulation. Franchisees are neither the servants nor the agents of franchisors. Nor is there usually a fiduciary relationship between the two. A franchise is simply the grant of a right to deal in goods or services with which the grantor is in some way connected. It may be a right to sell a product imported or manufactured by the franchisor or

the right to use the latter's name or image. It may be accompanied by a licence of intellectual property rights, or simply involve a particular method of doing business. Sometimes there may be no franchisor, simply a group of independent businesses conducting themselves under a single name in a uniform style. Two common elements are:

(1) Continuing Relationship
A franchise is more than a one-off joint venture. What the franchisor is offering is a relationship in which it takes an ongoing interest in the way in which the franchisee conducts its business. A franchisee is something more than a middleman and less than an agent, per Toohey J in *Richard v Golden Fleece Petroleum Ltd* (1983) ATPR 40-392 of 40,596. (Agency may of course exist for some purposes in a franchise relationship).

(2) Collective Image
Those engaged in franchising tend to talk in terms of the "image" of a franchise. This has wider connotations than a common name or product appearance. It is neither an intellectual property right nor in itself the fitting subject of a passing off action (although aspects of it may be). It embraces such disparate factors as the nature of the outlet through which a product is sold or a service provided, the visual appearance of either outlet or product, the medium through which it is advertised and the style of the advertisements themselves. A franchise has been described by Harkins *Tying and the Franchise* (1979) 47 Anti Trust L J 903 at 904, as containing three elements: an original idea, some distinctive embodiment of that idea and one or more products or services around which the idea can be woven. The order is important. The end product or service is the least significant element.

B The impact of the Commerce Act on franchises

Many of the mechanisms by which franchises are controlled are potentially restrictive trade practices and may well merit scrutiny under Part II of the Act. All of the practices dealt with in Part II are unlawful unless forgiven in advance by the Commerce Commission under Part V. There is no such thing as an examinable trade practice under the 1986 Act. The framers of the Act adopted two quite distinct modes of controlling trade practices. Sometimes specific conduct is proscribed whether or not it is anti-competitive in a given case. Other provisions require a finding that practice has the purpose or effect of inhibiting competition or abusing market power.

1 General Prohibitions affecting Franchises

The most worrying provisions of the Commerce Act for those engaged in franchising are those which look at the economic outcome of particular actions, or the intent behind them. It is seldom possible to advise with any confidence whether or not a particular franchise arrangement is caught by this widely flung net. The Act's general prohibitions are of two kinds: Those contained in ss 27 and 28 which are directed to collective activities which substantially lessen competition in a market and s 36 which seeks to prevent a business from abusing its dominant position in a market. Both require that market be defined.

(a) Markets and Franchises
Section 3(1) of the Act merely requires that the relevant market be situated in New Zealand and be distinguishable "as a matter of fact and commercial common sense". This leaves both the Courts and the Commerce Commission considerable freedom to adopt whatever method of delineating a market which they find useful in a given case. The literature on market definition is immense and it is not intended to add to it here at any length. Markets may be defined by territory or according to whether the goods or services traded in them may be substituted for each other. In any given case both are likely to be relevant. The boundaries of a market are usually found by asking how buyers would respond to a notional price increase or (less often) how sellers might react to a change in demand. If a price increase were to cause buyers to change brands or buy the same brand elsewhere, the substituted brand or new source is in the same market as those it replaces *Re QCMA and Defiance Holdings* (1976) 8 ALR 48 at 517. Substitutability is not a constant, consumer whim or technological advance may change it overnight. Nor should one be led astray by the deceptive simplicity of the test outlined above. Finding the appropriate market in the real world is a complex business not easily subjected to empirical analysis. Substitution is possibility rather than an actuality. Markets based on substitutability may cut across the traditional tripartite distinction between manufacturers (or importers) wholesalers and retailers, a distinction which is not, in any event, altogether appropriate to a franchise system where franchisors may supply or manufacture nothing or do both in competition with their franchisees. More usually franchisors and franchisees will be operating in distinct markets. Distinct, but interdependent. Activity in one market is never wholly without its impact on the other.

(i) The Franchisor's Market A franchisor totally without competitors is rare. Franchisors operate in two quite different types of market. Where the franchisor sells its own products (whether as manufacturer, importer or wholesaler is irrelevant for this purpose) to the franchisee the franchisor's competitors may be a vertically integrated distributor of similar products or a rival franchising system. (It may even be a mass of independent retailers who obtain products from the same source as the franchisor. Taken individually these are also the competitors of franchisees.) Here the competition is between brands. Where, however, a service alone is marketed or the franchisor provides only the image or format through which goods are sold, the franchisor's market is harder to pinpoint. A franchisor who purveys no products cannot easily be said to be in competition either with wholesalers or importers from whom franchisees obtain their supplies or with a vertically integrated manufacturer who sells directly to consumers in competition with those same franchisees. Strict logic would seem to dictate that if image franchisors have competitors it must be other image sellers, and yet such a result seems to be absurd. A franchisor who sells nothing but

the right to package and present pizzas would probably regard a chain of restaurants under single ownership which sold similar comestibles as its own competitor rather than its franchisees. Certainly a market splitting agreement between them would have an effect on the product market as well. In most cases, the structure of the Act ensures that the dilemma is more apparent than real. Part II does not usually require that all persons engaging in, or party to, anti-competitive conduct be operating in the same market as that in which the effects of that conduct are felt. (Section 36 expressly prohibits an abuse of market power outside the particular market dominated. Section 3(4) has a similar effect in cases under ss 27 and 28. The resale price maintenance provisions of the Act (ss 37, 38) do not require market definition for their operation.) Only under ss 29 and 30 is the inability to describe the franchisor's market likely to cause difficulties.

(ii) The Franchisee's Market is rather more easily defined. A franchisee will be competing either against sellers of goods and services which are substitutable for its own or against those who provide the same goods or service from a different location. The market thus defined may be shared with a vertically integrated chain, other franchise systems, or independent traders. It may even be shared with a franchisor who markets directly or other franchisees under the same system who are geographically close enough to tempt customers away.

(iii) Inter and Intra-Brand Competition Product franchises usually have the effect of restricting intra-brand competition. (In an image-only franchise the whole point is to do away with intra-brand competition entirely by presenting both product and service as identical at all franchised outlets.) A franchisor accused of restricting intra-brand competition is likely to riposte by pointing out that the franchise positively stimulates competition between brands. This may be so in a given case. Such assertions should always be empirically tested. There is no need to embrace the view of the more fundamentalist neo-classical economists that restraints on intra-brand competition are always benign while interference with inter-brand competition is invariably reprehensible, a notion fast becoming orthodoxy in American anti-trust circles and which has now received the *imprimatur* of the United States Supreme Court, *Continental T V Inc v GTE Sylvania Inc* 433 US 36 at 52, n 19 (1976). No doubt such beliefs are a natural response to the equally over-rigid view previously held by American Judges that all restraints on competition whether inter or intra-brand were equally evil, *United States v Arnold, Schwinn and Co* 338 US 365 (1967). It would be unfortunate if the New Zealand Act were to be subjected to the same tug of war between absolutes. There should be no initial presumption that either inter or intra-brand competition is more virtuous. In most cases it will be found that franchises maximise competition between brands at the price of restricting competition within a brand. This does not mean that gains or losses neatly balance out in every case. A product or process may have so few rivals that it becomes imperative to maximise intra-brand competition.

(iv) Single brand markets There is a line of Australian authority which suggests that "market" may sometimes be co-terminous with a single brand so that a product franchise constitutes an actual or virtual monopoly, *Top Performance Motors v Ira Berk* (1975) 5 ALR 465 at 467. So enamoured have Australian Judges become of this concept that they have continued to adhere to it (*J Ah Toy Pty Ltd v Thiess Pty Ltd* (1980) ATPR 40-155; *Tavernstock Pty Ltd v John Walker & Sons* (1980) ATPR 40-184 at 42, 525) even in the face of legislative changes designed to bring about its extinction by writing the test of substitutability into the statute. While on the face of it the idea of a market in a single brand of motor car or scotch whisky would seem to be risible (even the most ardent devotees of a particular brand of either are unlikely to become a pedestrian or turn teetotal if deprived of their choice) it should be remembered that the New Zealand *Act* contains no express mandate for adopting substitutability as the overriding determinant of what constitutes a market. There is nothing in s 3(1) which is inconsistent with the notion of a single brand market. If such a concept were to find favour with the Courts or the Commerce Commission very few franchises would be outside the reach of Part II. Such a result seems unlikely.

Under the 1975 Act the Commission demonstrated its attachment to inter-changeability of products to define the relevant market in merger cases and it is unlikely to abandon it now. Nor is the High Court likely to find Australian precedent on this point compelling. The Australian cases are long on assertion and short on analysis (in one case taking the definition of market from the dictionary and refusing to hear evidence on substitutability, *Top Performance Motors v Ira Berk* (1975) 5 ALR 465.) They have been trenchantly criticised in that country (Walker-Note in 50 ALJ 89), and it would be foolish to follow blindly what is increasingly seen there as an aberrant approach.[2] This is not to say that markets and brands are never co-terminous as a matter of fact. The fact must be demonstrated however. This may be done by showing either that the franchisor has a local or national monopoly in the franchised product or that consumers will do without rather than abandon it for inferior competitors. Similarly, there may be competition among brands but if only one brand supplies its dealers with spare parts there may be a brand market in the parts (cf *Hugin v E C Commission* [1979] ECR 1869; *General Motors v E C Commission* [1975] ECR 1367). The same result would obtain where only one brand can be imported because of the vagaries of the import licensing system (cf *B P v E C Commission* [1978] ECR 1513).

(b) The Effect of Franchises on Competition

Franchisers are the victims of their own public relations so far as competition law is concerned. As one American writer has observed:

> It is ironic that, while the marketing objective of most franchisors is to present to the public what appears for most relevant purposes as a unitary

> vertically integrated enterprise ... the legal focus has traditionally been instead upon the internal links of the individual system (Zeidman, *The Rule of Reason in Franchisor-Franchisee Relationships* (1979) 49 Anti-Trust L J 873 at 875).

It is the franchisor's misfortune that it must do visibly by way of contract or external arrangement what its vertically integrated rival does by internal administrative *fiat*. (It would be a mistake to assume that small traders are unwillingly absorbed into the franchise system. A franchise is not always simply an unpalatable alternative to outright takeover). The difficulty which faces franchises is that the gains to competition are generally prospective while the anti-competitive effects are felt here and now. Competition is defined in s 3(1) as workable or effective competition. The Australian cases view competition as a process rather than a situation (*Re Queensland Co-operative Milling Association* (1976) 25 FLR 169 at 188; *Re Outboard Marine Australia Pty Ltd v Hecar Investments* (1982) 44 ALR 667 at 669) so that the pro and anti-competitive effects of particular actions or arrangements may be offset against each other. The structure of the individual sections in Part II does not always permit such "balancing" as we shall see.

(i) Anti-competitive franchise arrangements All franchises place limits on the market freedom of the franchisee. These may be designed as quality controls or they may have a more malign purpose. A franchisor may view its franchisees as its most dangerous competitors and impose limitations designed to stunt their growth. The franchise may be designed to tie up existing outlets so that the franchisor has no need to respond to technological changes or shifts in consumer taste. A franchise system may be hastily erected to prevent penetration of a market by imports when import licensing is removed from the franchisor's products. Nor should it be assumed that only franchisors have anti-competitive thoughts. Franchisees are no doubt glad to see potential rivals absorbed into the system and safely chained to a particular territory. Most franchisees would expect the franchisor to have no dealings with outlets outside the system and would see it as the function of the system to make the market untenable for their competitors. Franchisees may collude to keep prices level throughout the system and insist that the franchisor act as enforcer. Nor is it always a question of evil intent. Limitations may be imposed for the noblest motives of image presentation and quality control and yet have all the anti-competitive effects just described.

(ii) Franchises as Facilitators of Competition Defenders of franchises are quick to point out that their impact on competition is never wholly negative. This is usually done by inviting inquiry into the state of competition in the market if the franchise did not exist. A franchise may be the only way of encouraging investment in a new product or process. It can enable a mass of small traders to band together to obtain access to finance or materials on terms usually reserved for larger entities thereby enabling them to compete more effectively with those same entities. Franchising enables franchisees to increase their market share at the expense of vertically integrated competitors by establishing a common identity through joint advertising and standard packaging or presentation. By providing training for staff and access to manuals and parts, franchise systems enable franchisees to offer ancillary services normally found only among their larger competitors. A franchise allows franchisees to avail themselves of financial and accounting advice which they could not afford as independent operators.[3] In all these cases the effect of the franchise on the market is measured against the strength of competitors. If the franchisor already has a near monopoly and the only opposition is a dwindling band of small traders none of the above will be given much weight. Where the likely competitor is a large aggressive corporate giant selling through wholly owned outlets with a proven history of absorbing rivals by takeover one would expect such factors to weigh very heavily indeed.

(c) Abuse of market power — s 36 Section 36 prevents both franchisors and franchisees from using a dominant position in a market to (i) restrict entry to, or force an exit from, a market or (ii) block or discourage others from engaging in competitive conduct in a market. Dominance is defined as being "in a position to exercise a dominant influence over the production, acquisition, supply or price of goods or services" in the market said to be thus dominated. As it appeared in the original Bill s 36 recognised only two forms of market dominance: (i) controlling a sufficient high proportion of the total activity in a market (market share) or (ii) sitting athwart access by others to capital materials or technology. In its final form the Act recognises (in s 3(8)) that markets may be dominated in subtle and unforeseeable ways of which these are but two examples and that regard should also be had to the extent to which the supposed dominator is constrained by the conduct of competitors (actual or potential), suppliers or customers. The market in which power is exercised need not be the same as the market in which the effect of that power is felt. Although both the Australian and EEC equivalents (*Pronuptia de Paris v Schillgallis* [1986] 1 CMLR 414) of s 36 have been used to strike at franchising, the New Zealand Act has two inbuilt restrictions which limit its effectiveness in that regard: the requirement that market domination be exercised unilaterally and the focus on intention rather than effect. Conversely, the attraction of s 36 for those who would destory or rewrite a franchise lies in the fact that it largely ignores the pro-competitive effects of a franchise while at the same time requiring a grip on the market which is less than total.

(i) collective or unilateral action? Section 3(8) requires that dominance be exercised by a single entity either acting alone or through companies in which it has a controlling interest. This does not embrace collusion between franchisor or franchisee or collective action or agreement among franchisees. Nor is s 36 an apt vehicle for mounting an assault on a cartel between a franchisor and

its competitors.

(ii) monopoly not necessary for dominance Nothing in s 36 requires that the franchisor possess a total local monopoly in the franchised product. To hold, as in some Australian cases (*Tavernstock Pty Ltd v John Walker & Sons Ltd* (1980) ATPR 40-184), that there is no dominance where the franchisee can obtain supplies elsewhere even if that supply is on crushingly onerous terms would be to neuter s 36 entirely.

(iii) proof of purpose necessary Section 36 looks at the intention rather than the effect of the franchisor's conduct. Market dominance must be exercised with a view to bringing about one of the improper purposes set out in s 36(1). The fact that such conduct *results* in a diminution of competition is not in itself a breach of s 36 (cf *Trade Practices Commission v CSBP & Farmers Ltd* (1980) 53 FLR 141). It is not, however, necessary that the franchisor actually control the relevant market. It is sufficient (once again by virtue of s 3(8)) that it be in a position to do so (Ibid at 321).

Franchisors will usually assert that they are acting to preserve the image or quality of the franchised product. Such assertions are likely to be difficult to rebut unless past dealings with franchisees have been overtly bullying or the conduct is sporadic, so that it is in evidence only when newcomers seek to enter the market or franchisees threaten to flee the fold (cf *Victorian Egg Marketing Board v Parkwood Eggs Pty Ltd* (1978) 20 ALR 129).

(iv) balancing precluded under s 36 Once dominance and improper purpose are demonstrated, however, they cannot be offset by pointing to effects of the unlawful plan which are beneficial to competition in the long term. This is true even under s 36(1)(b) which is directed at conduct which seeks to prevent or deter "any person from engaging in competitive conduct" in any market. This looks not at the effect on competition in the market as a whole but the intended impact on the activities of competitors.

The pro-competitive effects of a franchise arrangement are relevant under s 36 only in so far as they go to negative an implied intent and even this may not be convincing since franchisors can seldom be convincingly presented as interested in striking a blow for competition for its own sake.

(d) Practices substantially lessening competition, ss 27, 28
Sections 27 and 28 forbid dealings which have the purpose or likely effect of "substantially lessening competition in a market". "Substantially" is not defined.

Judicial attempts to throw some light on "substantial" in the equivalent Australian provision by pointing out that it may mean either "big" or "not little" according to the context, do not take us very far (*Radio 2 UE Sydney Pty Ltd v Stereo FM Ltd* (1982) 2 TPR 315 at 320 per Lockhart J). Comments that "substantial" grows or contracts with the nature of the business and the size of the market are equally opaque. "Lessening" by virtue of s 3(2) includes preventing or hindering. Section 3(3) requires that all the factors affecting competition in a market be taken into account, a statutory warrant for balancing pro and anti-competitive effects if such be needed.

Section 27 is a general provision covering anti-competitive dealings while s 28 deals with covenants running with an estate or interest in land so that they bind persons not party to the original anti-competitive arrangement. While ss 27 and 28 do contain much common ground they sometimes part company, with somewhat unpredictable results.

(i) Common Purpose or Unilateral Act? Because it refers only to contracts, arrangements and understandings s 27 requires some element of common purpose or consensus, even if that consensus be coerced. The unilateral exercise of market power to diminish competition or the mere existence of a monopoly do not themselves constitute a breach of s 27 (*TPC v Email Ltd* (1980) ATPR 40-172) unless such things are used, or sought to be used, to bring about or sustain an anti-competitive consensus. Section 28 does, however, expressly forbid unsuccessful attempts to bring about a consensus (s 28.6). While s 27 contains no similar express provision a rebuffed attempt to enter into an anti-competitive agreement which would, if successful, be in breach of that section, may expose the maker to pecuniary penalties under s 80. Such importuning may also be forbidden by injunction under s 81.[4]

(ii) Proving a Consensus An anti-competitive consensus may be expressed or inferred from words or conduct. Nor should the Courts or the Commission be deterred (as some Australian Judges appear to have been) from going behind an innocently pro-competitive term in an agreement to find the parties, real intent (see *Transfield Pty Ltd v Arlo International Ltd* (1980) ATPR 40-166, at 42, 309, and 42, 313, cf *T P C v David Jones Pty Ltd* (1986) ATPR 40-621).

Under s 27 the consensus need not result, or be intended to result, in a legally binding contract (*Re Wellington Fencing Materials Association* [1960] NZLR 1121 at 1130; *Re Registered Hairdressers* [1961] NZLR 151 at 170; *Re Master Grocers Federation* [1961] NZLR 177 at 181), while under s 28 the covenant or proposed covenant must be or be intended to be effective to run with the land. Unconscious parallelism whereby persons fortuitously follow a common practice is within the scope of neither section (*Master Grocers* op cit at 181). Common conduct may give rise to an inference of agreement where it is engaged in by a suspiciously large number of participants (*Interstate Circuit Inc v US* 306 US 208 (1939)), or results in behaviour which would be contrary to a person's self-interest in the absence of an understanding or agreement (*Milgram v Leows Inc* 192 F 2d 579 at 583 (1939)). Again, while it is usual (some would say necessary)[5] for there to be some communication between the parties it is not required that the whole agreement or understanding be contained in that communication. A franchisee who enters an existing franchise system may simply fall in with all or some existing anti-competitive arrangements as it becomes aware of them. Similarly a franchisee may be a party to a global anti-competitive undertaking without being wholly committed to

each and every one of its provisions, (*TPC v David Jones Pty Ltd* (1986) ATPR 40-671). Conversely the mere exchange of information within the franchise system does not constitute a consensus unless it leads to a common course of conduct (*TPC v Email Ltd* (1980) ATPR 40-172 at 42,830). An express arrangement may, however, be within s 27 even though some of the parties are untouched by its provisions (*TPC v David Jones* op cit) or all or some of them later act inconsistently with its terms (*F C T v Lutovi* (1978) 22 ALR 519 at 525).

(iii) One Way Restrictions There is nothing in ss 27 or 28 which requires mutuality between the parties at least where the understanding or arrangement is express (*T P C v Email Ltd* op cit at 42,377; *Morphett Arms Hotel v T P C* (1980) ALR 88, at 91). There may be an understanding even though all the obligations are placed on one party. The presence or absence of consideration is irrelevant here.

(iv) Horizontal or Vertical? Section 27 does not distinguish between horizontal or vertical arrangements. In so far as there are dealings between franchisees these may be arrangements or understandings. Similarly limitations or imposed by a franchisor on a franchisee (or, more rarely, the opposite) may be caught. By virtue of s 3(5) it is possible to aggregate the franchisor's separate agreements with each franchisee to determine their combined anti-competitive effect in either market. Section 3(6) permits a similar aggregation for the purposes of s 28.

(v) Making or Enforcing? Sections 27 and 28 proscribe both the making of the consensus and giving effect to it once made, either by carrying out its terms or acting collaterally to prop it up (see the definition of "give effect to" in s 2). Section 28 also encompasses threats to act adversely to the other party to the covenant if its terms are not complied with. Section 27 only arguably does so. (Threats may be purported enforcement under s 2, although once again ss 80(1)(e) and 81(d) may be prayed in aid against such threats where the appropriate remedy is sought.)

(vi) Purpose and Effect Both sections 27 and 28 look to the result as well as the intent. Dealings which, have or are likely to have, anti-competitive effects are just as forbidden as those with an avowedly anti-competitive purpose. Even where purpose is relied on the effect of s 2(5) is that this need only be one aim among many. Reducing or hindering competition must however be a "substantial purpose" of the contract arrangement or understanding in question (cf Trade Practices Act 1974, S 4F. See also *Tillmanns Butcheries Pty Ltd v A M I E U* (1979) 42 FLR 348).

(vii) Is competition divisible? In the *Motor Vehicle Franchise Agreements Report* the Commerce Commission emphasised that an industry may be competitive taken as a whole and yet be riddled with anti-competitive practices. Those engaged in such practices cannot point to the overall health of competition in the industry as a defence. Section 27 does not they said, require that a global view be taken of competition in a given market. This view may be at odds with the s 3(3) mentioned earlier if that provision be construed as going beyond mere balancing so as to provide too precise a focus on any single to aspect of competition such as price. (The original Bill would have allowed such a focus. We may assume the omission to have been deliberate). Even if the Commission view be accepted this should not be taken as an endorsement of the dubious concept of the sub-market sometimes resorted to in Australian and American cases (*Re Queensland Cooperative Milling Association* (1976) 25 FLR 169 at 191; *In Re Tooth & Co Ltd* v (1979 ATPR 40-113; *Brown Shoe Co Inc v United States* (1962) 370 US 294 at 325). It is competition which is divisible not markets. Markets may overlap, they do not in the view of this writer, divide. "Sub-market" is not in any event a useful concept in the franchise context.[6] The franchisees' market is not a sub-division of the franchisor's. Nor should "market" be equated with "industry" (It may have been this that led the Commission astray in *Motor Vehicle Franchise Agreements*).

Practices prohibited without inquiry into purpose or effect

The remainder of Part II deals with practices which are thought to be so pernicious that they are forbidden outright without requiring any objective demonstration of their impact on the market or inquiring into the motives of those engaged in them. The *Commerce Act* 1986 adopts two modes of specific proscription. Some practices are prohibited by name (ss 29, 37 and 38). Others are deemed to be anti-competitive so as to bring them within s 27 without any need to prove either effect or purpose (s 30). Many common franchise arrangements are caught by these *per se* proscriptions. The position is further complicated by provisions such as ss 31, 33, 34 and 39 which exempt particular practices from the operation of the *per se* sections but leave them exposed to the general prohibitions in ss 27 and 28.

(a) Exclusionary provisions in dealings between competitors — s 29

Section 29 prohibits any contract arrangement or understanding which contains an "exclusionary provision". In order for a provision to be exclusionary two things are necessary: (i) At least two of the parties to it must be in competition with each other (or would be so if the provision did not exist). Such competition may be direct or through the medium of a parent or subsidiary, *and* (ii) the provision must be designed to prevent, restrict or limit the supply or acquisition of goods or services by all or any of the parties to or from any other person or class of persons. Such restrictions or limitations may be general or apply only in particular circumstances or on stated conditions. Effect is irrelevant under s 29. Improper purpose must be proven in every case.

The only franchise arrangements likely to be caught by s 29 are those made between franchisees or contained in an agreement which allows the franchisor to compete directly with franchisee. Section 29 contains no provision for aggregating agreements so that it is not possible to regard the franchise system as a whole as an exclusionary provision even though many of the franchisees would be in competition if that system did not exist. Where

the franchisor consults franchisees before making changes to the system or its membership the consultation may be held to give rise to an exclusionary provision especially where the franchisees then confer with each other. For the purposes of s 29 it is irrelevant who initiates the exclusionary arrangement.

(b) Price fixing between competitors ss 30, 34

The *Commerce Act* in ss 30 and 34 deems horizontal price fixing between competitors to have the prescribed anti-competitive consequence or intention for the purposes of ss 27 or 28. Sections 30 and 34 extend to controlling or maintaining prices indirectly as well as fixing them overtly. Even a transitional or temporary arrangement to fix prices is within these provisions (*T P C v Parkfield Operations* (1985) ATPR 40-639).

Price fixing need not involve all the participants in a market, two will suffice (whether acting directly or through related companies). Section 30 extends to attempts to regulate discounts, allowances, credits or rebates as well as prices proper. As with s 29, whether the parties are in competition with each other is determined by ignoring the price fixing arrangement itself (Another departure from the Australian model). Once again s 30 catches only collective action involving some or all of the franchisees (although the franchisor may be their collective instrument) or franchisor and franchisee acting to rig prices to mitigate the effects of direct competition between them. Most joint venture pricing and joint buying arrangements are outside the scope of s 30 as are prices recommended by trade associations of more than 50 members. All three may be caught by the general ss 27, 28 and 36 on proof of the necessary anti-competitive effect or intent.

(c) Resale price maintenance ss 37, 38

Section 37 extends somewhat the provisions of the 1975 *Act* relating to resale price maintenance. A franchisor is endangered by s 37 only where it supplies goods to the franchisee and then seeks to influence the franchisee not to sell them for less than an amount set by the franchisor or some other person. Price setting may be achieved through using a prescribed formula or method of calculation. The ways in which the franchisee may be compelled or induced to adhere to the set price are set out at length in s 37 and are not reproduced here. It suffices merely to note that there are few franchise agreements subtle enough or forms of pressure discreet enough to slither past these all embracing provisions, (cf *Trade Practices Commission v B P Aust* (1985) ATPR 40-638). Franchisors cannot avoid the fatal embrace of s 37 by casting price stipulations in a positive rather than a negative form eg loyalty bonuses to franchisees who keep their prices within a certain range (cf *AEG Telefunken v EC Commission* [1983] ECR 1179).

Must a franchisor actually stipulate the level at which he wishes to peg the franchisee's prices in order to be caught under s 37? It is true that both ss 37 and 38 require that prices be specified by *someone* but this does not require actual mention of the price. To absolve franchisors simply because their intention is to prevent a general downward pressure on prices in the franchise system and thus preserve that systems up-market image without ever wishing to stipulate particular prices would be mere casuistry. Section 37(4)(d) prohibits any statement or action which is likely to be understood by the victim as setting a particular price. Simply cutting off supplies and resuming them once a particular level was reached would be enough to bring a franchisor within this provision (cf *Hasselblad GB (Ltd) v EC Commission* [1984] 1 CMLR 559 at 593). Merely forbidding advertisements which promise "we will match any price" or "unbeatable prices" does not, on the other hand, constitute resale price maintenance within the meaning of the *Act* (although such conduct might amount to a non competitive arrangement under s 29 if a franchisor writes such prohibitions into its franchise agreements or secures an understanding from franchisees that they will not resort to such advertisements).

Section 38 deals with the situation where the franchisor does not itself supply goods to the franchisee but threatens to interfere with the supply of goods to franchisees from other sources or deflect customers away from the franchisee unless the set price is adhered to. It also forbids conduct by the franchisor which actually brings about either of these results without any threat actually being made. The franchisor will be caught by s 38 whether it acts unilaterally or jointly with some other person.

Neither s 37 nor s 38 applies to service only franchises. The vertical fixing of prices for services may still be caught by s 27 if an anti-competitive effect or intent be proved. Section 39 allows prices to be recommended if that fact is clearly stated.

3 Prior authorisation under Part V

Franchisors and franchisees who feel that their arrangements may be struck down under ss 27, 28 or 29 may apply to the Commission for authorisation under s 58. This will only be granted where the applicant succeeds in establishing that the arrangement etc is, or is likely to result in a benefit to the public which outweighs its anti-competitive effect (s 61). If Australian experience is any guide the parties to a franchise arrangement are likely to seek to avail themselves of this prospective absolution by claiming such virtues for their proposals as: increasing employment, preventing foreign takeovers, evening out costs and prices between town and country or obtaining access to the latest technology or marketing skills from overseas. Even if it be accepted that such are indeed public benefits (and the *1986* Act unlike its predecessor contains no stated presumptions either way) it may be that such benefits would accrue even if the anti-competitive practice did not exist. The Commission cannot authorise agreements simply because they are reasonable as between the parties (again a contrast with the Commerce Act 1975, s 21(2)(b). Nor can the parties to an anti-competitive agreement plead that they *intended* only to benefit the public. The test is objective (*Re Kempthorne Prosser* (1964) NZLR 49 at 54).

Franchise arrangements which fall foul of ss 36, 37 or 38 cannot lay claim to prior forgiveness under Part V (although an authorised practice cannot itself constitute a breach of s 36). Because s 30 is only

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Tort liability for ultra vires decisions

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This article discusses the legal implications of the litigation between a tourist development company, Takaro Properties Ltd, and a former Minister of Finance, Mr W Rowling, arising out of the decision by Mr Rowling to refuse consent to the infusion of overseas capital into the company, followed by the company going into receivership. It was first written for an English journal, Professional Negligence, *but in view of the considerable local interest in and significance of this litigation, it is also being published here in a slightly amended form.*

Background

In 1969 a Mr Stockton Rush embarked upon an ambitious project for the building of a luxury tourist fishing lodge near Te Anau in the South Island. He incorporated Takaro Properties Ltd, which became the purchaser and developer of the land needed for the project. Mr Rush together with members of his family took up most of the shares in the company. He also obtained considerable financial support from family sources in America. Building and development work commenced and Takaro Lodge opened for business in 1970.

Following extensive promotion in New Zealand and overseas it began to attract favourable publicity and a degree of patronage. By reason of the quality and scale of the operation the business was, however, seriously under-capitalised. When it became necessary to repay the advances obtained in America, Mr Rush sought to obtain the necessary funds by selling his shareholding to the Mitsubishi Corporation of Japan. The proposed takeover needed the consent of the Minister of Finance, Mr W Rowling, under the Overseas Takeover Regulations 1964 but in March 1973 this consent was refused, on the grounds that the proposal was well outside established guidelines for the acquisition by foreigners of shares in a New Zealand company. Mr Rush sought by various means to persuade the Minister to change his decision but was unsuccessful.

In the meantime the Lodge had continued to run at a loss and eventually it closed in May 1973. Mr Rush then put forward a new scheme for resolving Takaro's financial problems which involved the re-opening of the Lodge and the making of improvements to it by Takaro, the introduction of new capital by Mitsubishi and the development by a consortium of New Zealand businessmen, the Tse Group Consultants, of part of Takaro's land for the sale of holiday homes. Mitsubishi and the Tse Group each required participation by the other as an integral part of the rescue package.

The new proposals did not require the consent of the Minister under the 1964 regulations but did require his consent under the Capital Issues (Overseas) Regulations 1965 made pursuant to powers contained in the Reserve Bank of New Zealand Act 1964, s 28(1). As Mitsubishi's shareholding would be kept slightly below 25% of the voting share capital, the scheme would be within the published guidelines governing the criteria for the giving of consent under these regulations. Consent for the issue of new share capital to Mitsubishi was thus seen as virtually a formality.

When, however, the matter came before the Minister once more the application was again declined, no reason being given. Takaro commenced proceedings for judicial

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a deeming provision it seems horizontal price fixing may be authorised in advance as a practice embraced by s 27. Section 61 refers expressly to *deemed* anti-competitive effects as being capable of being outweighed by the public interest. If this does not refer to s 30 it is difficult to see why it was inserted at all. □

1 Franchises which are surrounded by a penumbra of intellectual property rights may be protected under s 45. The subject is too complex to be dealt with here. See Eagles *Intellectual Property as an Anti-Competitive Device.*

2 See for example the views of Franki J in *Ah Toy Pty Ltd v Thiess Pty Ltd* (1980) ATPR 40-155 at 42, 218. Unfortunately in *Tavernstock v John Walker and Sons* (1980) ATPR 40-184 at 42, 525 Franki J seems to have relapsed into the brand market heresy.

3 As to pro-competitive effects of franchises generally see *Continental T V v Sylvania Inc* 433 US 366 (1977).

4 Both ss 80 and 81 allow, *inter alia,* the making of orders against conduct which attempts to contravene any provision of Part II, counsels or procures such contravention or inducing or attempting to induce the same whether by threats, promises or otherwise. Australian authority would seem to suggest that it is the standards of the criminal law which must be met in such cases. Cf *T P C v Parkfield Operations* (1985) ATPR 40-639.

5 Compare the views of Willmer and Diplock L J J in *British Basic Slag's Application* [1963] 2 All ER 807. See also *Tyre Manufacturers Case* (1966) L R 6 R P C 49 at 102: *I C I Ltd v E C Commission* [1972] CMLR 557; *T P C v Nicholas Enterprises* (1979) 40 FLR 83 at 89.

6 The writer takes some comfort from the views expressed in "Donald and Heydon, Trade Practices Law" Sydney 1978 Vol 298. Less comforting is the (admittedly cursory) nod given to sub-markets by Davison C J in *Air New Zealand v Commerce Commission* [1985] 2 NZLR 338 at 345.

review and in August 1974 it was held by Wild CJ in the Supreme Court that the Minister had acted invalidly and in excess of his powers *(Takaro Properties Ltd v Rowling,* unreported, Wellington, 22 August 1974).

The evidence showed that the dominant reason for Mr Rowling's decision was to induce a reversion of the land either to the Crown or to New Zealand interests generally and the Chief Justice decided that this was a consideration which Mr Rowling was not entitled to take into account in terms of the empowering Act and regulations. The regulations were concerned with safeguarding the overseas resources of New Zealand, not with the private ownership of land within New Zealand. The Crown appealed but in February 1975 the Court of Appeal affirmed the decision of the Chief Justice *(Rowling v Takaro Properties Ltd* [1975] 2 NZLR 62). By that time, however, Mitsubishi had lost interest in the project and Takaro was unable to find any other source of fresh capital. Shortly afterwards Takaro went into receivership and both it and Mr Rush personally suffered heavy losses.

Action for damages

Takaro and Mr Rush then began an action for damages against the Minister, pleading a number of different causes of action. In particular it was alleged (a) that in refusing consent the Minister had acted negligently and/or unreasonably in exercising his statutory powers; and (b) that the Minister had acted ultra vires without knowledge that he was so acting. The defendant successfully applied to the Supreme Court to have these (amongst other) claims struck out as disclosing no cause of action *(Takaro Properties Ltd v Rowling* [1976] 2 NZLR 657).

However, in the Court of Appeal *(Takaro Properties Ltd v Rowling* [1978] 2 NZLR 314) it was held to be at least arguable that in the circumstances a common law duty of care was owed by the Minister to the company. This issue of law thus was left for consideration in the context of all the evidence to be given at the trial itself. On the other hand, the allegation that the Minister had acted unreasonably in exercising his statutory powers was held to add nothing to the allegation of negligence and remained struck out. Again, merely to prove without more that the Minister had invalidly exercised his powers was no sufficient foundation for an action for damages and this allegation also remained struck out.

The action eventually arrived for determination in the High Court by Quilliam J *(Takaro Properties Ltd v Rowling,* unreported, Wellington, 10 December 1982). His Honour accepted that a duty of care of the kind alleged was owed by the Minister to each of the two plaintiffs. However, he held on the facts that there had been no breach of the duty and also that the plaintiffs had failed to show that the refusal of consent had caused the losses the subject of the claim. The actions accordingly failed. The case then went to the Court of Appeal for a third time *(Takaro Properties Ltd v Rowling,* CA 22/83, 1 May 1986). After reserving Judgment for 18 months, the Court unanimously allowed the appeal by Takaro but dismissed that by Mr Rush. The existence of a duty of care owed by the Minister to Takaro was affirmed and, differing from Quilliam J, it was also decided that the Minister had in fact been negligent and that this negligence did cause Takaro to suffer a substantial loss, albeit that the loss was particularly difficult to quantify.

A number of interesting legal issues arise out of this lengthy saga. These concern (i) the test for determining whether the circumstances are such as to give rise to a duty of care; (ii) the particular policy factors bearing upon the scope of any duty arising in these circumstances; (iii) how a breach of the duty may be established; (iv) how damages should be assessed; and (v) what the position would have been had Mr Rowling known that he was acting beyond power.

The duty issue

Woodhouse P, the only Judge to have participated in all three appeals, commenced his discussion of the relevant legal issues by looking at the validity or otherwise of Lord Wilberforce's two-stage duty enquiry in *Anns.* He noted that the two-stage test had been accepted by the New Zealand Court of Appeal on a number of occasions but that in *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1985] AC 210 Lord Keith had, with the concurrence of the other Lords of Appeal, thought it better to ask simply whether it was just and reasonable that a duty of care of particular scope be incumbent on a defendant.

Woodhouse P nonetheless affirmed the view he had earlier expressed in *Scott Group Ltd v McFarlane* [1978] 1 NZLR 553 that the two-stage enquiry is a practical and logical means of assessing the duty of care issue in a novel situation. He said that at the first stage of deciding whether there was a prima facie duty of care it put forward the well understood concept of foreseeability of loss as the objective test of proximity, thus doing away with the almost subjective qualifications which earlier Judges had sought to apply in varying situations in order to minimise or avoid attribution of legal responsibility where actual responsibility and carelessness was obvious. These earlier qualifications would still have their greater or lesser significance, but at the second stage of the enquiry, where a defendant shown to owe a prima facie duty had to demonstrate affirmatively that there were proper reasons which negatived or limited the duty.

His Honour thought that unless the analysis was approached in such a progressive fashion, these second stage considerations were not only likely to distract attention from the initial question as to whether there was a prima facie situation of responsibility but as well, if the answer would have been "yes there is such a duty", relieve the defendant of the onus of showing why he should be outside its scope. He added that in propounding this view he did not overlook the views expressed by the High Court of Australia in *Sutherland Shire Council v Heyman* (1985) 59 ALJR 564 or by the English Court of Appeal in *Investors in Industry Ltd v South Bedfordshire DC* [1986] 1 All ER 787.

A rather different view of the *Anns* test was ventured by Somers J. He doubted whether Lord Wilberforce meant to convey that foreseeability of damage was the sole test of proximity. In simple cases foreseeability might be sufficient to give rise to a prima facie duty, but in more complicated cases closer proximity of the kind contemplated by Lord Atkin in *Donoghue v Stevenson* [1932] AC 562 at 580 and emphasised by Lord Reid in *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 at 1026-1027 seemed likely to continue to be

necessary. In appropriate cases this might include reliance by the plaintiff on the defendant's taking care. The view that foreseeable damage itself gives rise to a duty of care had not been accepted in England or Australia whereas in New Zealand it was not clear that the meaning to be attributed to the first step mentioned by Lord Wilberforce and whether the law of negligence is best served by a simple formula to assess the existence of a prima facie duty of care had been fully debated. His Honour preferred not to reach any concluded view on the issue until it was fully argued.

Recent House of Lords decision

The House of Lords also has, in *Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd : The Aliakmon* [1986] 2 All ER 145, recently given further consideration to this matter. Lord Brandon there observed (at 153) (i) that Lord Wilberforce could not have intended to provide a universally applicable test of the existence and scope of a duty of care in the law of negligence, and (ii) that his Lordship was dealing with the approach to be adopted in a novel type of factual situation and was not suggesting that the same approach should be adopted to the existence of a duty of care in a factual situation in which the existence of a duty had repeatedly been denied. Thus it was held that *Anns* did not purport to cast doubt on a long line of authority holding that buyers on whom fell the risk of damage to goods but who were not owners of the goods nor who had an immediate right to their possession had no right to sue ship-owners in tort for damage done to the goods.

What role in the law of negligence the *Anns* test will play in the future is not easy to say, particularly as its true interpretation remains obscure. The view apparently favoured by Woodhouse P that foreseeability of loss always gives rise to a prima facie stage one duty seems unlikely to be accepted outside New Zealand and has now specifically been disavowed by Lord Brandon in the House of Lords.

It does in fact seem quite clear that often foreseeability alone cannot be determinative. There are various categories of cases where loss is foreseeable yet no duty at all or only a very limited duty has ever been seen to arise. It cannot, for example, be said that there is any prima facie obligation to go to the assistance of persons who are in danger through no fault of the presumptive rescuer. On the other hand there is the thesis suggested by Somers J (and by Gibbs CJ in *Sutherland Shire Council v Heyman* (1985) 59 ALJR 564 at 570) that stage one embodies a principle of proximity as well as foreseeability – that in some circumstances a relationship far closer than that of mere neighbourhood must be established before any prima facie duty will arise.

This analysis also is open to objection. It does not explain cases of no duty: and as on the face of it no policy choice is made at stage one of the enquiry it means that the process of classifying a case as one where a restricted duty only should be recognised is done without any explicit recognition of the policy factors involved. Thus a policy fear of "opening the floodgates" in pure economic loss cases is both quieted and concealed in a stage one enquiry which looks to whether there was foresight of *particular* loss suffered by a *particular* plaintiff, or whether there was a relationship almost amounting to contractual privity. See, in particular, *Junior Books'* case [1983] 1 AC 520. Furthermore, if policy is in fact taken into account at stage one than the stage two enquiry seems to become largely redundant. This whole matter is discussed in detail by J Smillie in "Principle Policy and Negligence" (1984) 11 NZULR 111.

The position can be summarised in this way. Foreseeability of injury to one's "neighbour" is always a necessary condition for the imposition of a duty of care. Normally it will also be a sufficient condition in cases concerning the positive infliction of physical harm to the person or property of the plaintiff. In other classes of cases, where the damage is of a different kind, being, for example, financial or by way of nervous shock, or where the damage was caused other than by active conduct, for example by mere omission or by words, or where the defendant held a special status or was exercising a special function, as in actions against a barrister or a public authority, a duty may be denied or limited for reasons of policy.

It is quite clear that the old "category" approach to the determination of the duty question retains its vitality. In novel or borderline cases the Courts reason by analogy from precedent, weighing, with or without explicit acknowledgment, the relevant policy arguments in determining whether an extension of liability is justified. There is no presumption in favour of a duty involved in this approach. the two-stage test suggests otherwise and tends, moreover, to obscure the true nature of the process of classification and the rationale behind the decision which is reached and should, therefore, be seen as an unreliable guide.

Policy Considerations

There is not much authority prior to *Takaro* in support of the view that negligence in the actual making of an invalid administrative decision can give rise to a private law liability. The possibility was contemplated by the Supreme Court of Canada in *Welbridge Holdings Ltd v Metropolitan Corporation of Greater Winnipeg* (1970) 22 DLR (3d) 470 where a distinction was drawn between the legislative or quasi-judicial functions of a municipality on the one hand and its administrative or ministerial functions on the other. A duty could arise only as regards the making of a decision in the latter type of circumstance. Here the plaintiff suffered loss after buying land in reliance on an invalidly amended zoning by-law. His claim failed on the ground that the defendant was acting in both a legislative and quasi-judicial capacity and was, therefore, immune from liability.

In the more recent decision of the Privy Council in *Dunlop v Woollahra Municipal Council* [1981] 1 All ER 1202 Lord Diplock expressed doubt as to whether a council owed a building developer a duty of care to ascertain whether a resolution restricting the permitted number of storeys of a building to be erected on the developer's land was within its statutory powers to pass. His Lordship found it unnecessary to delve further into this "interesting jurisprudential problem" since no breach of any duty had been shown, the council having taken apparently competent legal advice on the matter. Again, in *Bourgoin SA v Ministry of Agriculture, Fisheries and Food* [1985] 3 WLR 1027 the Court of Appeal in England held that a private individual could not recover damages from the Crown for an injury caused to him by an ultra vires order made in good faith, and did not advert to

any possibility of bringing a negligence action.

Recognition of duty

There are several matters of policy bearing upon the question whether the postulated duty ought to be recognised and which are raised in the above cases and/or in *Takaro*. These need to be identified and evaluated.

The "looking over the shoulder" factor. In *Bourgoin's* case Nourse LJ said (at 1089) that the no damages rule was grounded on the sound acknowledgment that a Minister of the Crown should be able to discharge the duties of his office expeditiously and fearlessly, a state of affairs which could hardly be achieved if acts done in good faith, but beyond his powers, were to be actionable in damages. This factor has quite often been suggested as a good policy reason for restricting or negating a duty of care but in recent cases, at least, the Courts usually have declined to accept it. Thus the House of Lords in *Saif Ali v Sydney Mitchell & Co.* [1980] AC 198 certainly did not see it as compelling the grant of an immunity from suit to a barrister. Such significance as it has is largely negated by the fact that the defendant personally will not usually pay any damages, either because his employer will or because he is insured. The point was not even mentioned in *Takaro*.

Financial loss and the fear of indeterminate liability. The claim in *Takaro* was for pure economic loss yet it clearly did not fall within the ambit of the familiar *Hedley Byrne* type of action. The nature of the damage might, therefore, be seen as a factor bearing upon the existence or scope of any duty but there was not in fact very much discussion about the matter. Woodhouse P (with whom Richardson J agreed) merely observed in general terms that purely economic loss arising from negligence is now recoverable in New Zealand.

Later on in the Judgment he referred to his view in the earlier interlocutory proceedings that, assuming all the allegations contained in the statement of claim were correct, the relationship betwen the parties clearly was sufficiently proximate to give rise to a prima facie duty. The Minister had taken a direct hand in processing Takaro's application and had been given detailed information concerning all that hung on his decision. Now that the case had been heard he was confirmed in his earlier opinion. Indeed a duty was conceded in the High Court. Somers J similarly thought there to be no doubt about the point. The Minister stood to Takaro in such a proximate relationship of circumstance and the connection between the refusal of consent and the damage which might ensue from such refusal was so close that a contrary argument could not reasonably be mounted.

Cooke J also found that the decision which the Minister had to take was of vital concern to the company and thought there was virtually direct proximity or neighbourhood. A duty could arise in the making of a statutory decision crucially affecting an applicant's economic interests and in the present kind of situation it was just and reasonable that this should be so. The doubt expressed by Lord Diplock in *Dunlop's* case could not be elevated into a proposition that a minister could never be under such a duty.

The significance of the link between the nature of the damage suffered and the requirement of special proximity between the parties is not made at all clear, certainly not in the Judgments of Woodhouse P and Somers J, and to this extent these Judgments tend to conceal the continuing impact of the "floodgates" argument in the way described above. The policy which is at stake here is, however, highlighted by the Court's unanimous decision to dismiss the appeal by Mr Rush personally. Cooke J devoted most attention to the point. He thought that as a matter of policy it would take the law of negligence unacceptably far to impose on a Minister a duty of care, not merely to the company whose application he is considering, but also to persons interested in the company in various ways, as by shareholding or employment or as creditors. So wide a vista of liabilities would be opened up by such an extension of the law that he could not think that the legal system was ready for the step. Harm to persons interested in the company was foreseeable and there was some degree of proximity to them but the relationship was not close and direct enough to overcome the indeterminacy fear.

It is not, perhaps surprising that the Court of Appeal had so little difficulty in recognising a duty owed to Takaro. New Zealand has gone further than other common law countries in allowing recovery for economic loss caused by negligence. See, in particular, *Allied Finance & Investments Ltd v Haddow* [1983] NZLR 22; *Gartside v Sheffield, Young & Ellis* [1983] NZLR 37; *Meates v Attorney-General* [1983] NZLR 308. Whether the drawing back seen elsewhere as regards, for example, local authorities' liability for the negligent inspection of building work *(Peabody's* case, above, *Sutherland Shire Council v Heyman,* above; though cp *City of Kamloops v Nielsen* (1984) 10 DLR (4d) 641) or claims by non-owners for damage to property *(The Mineral Transporter* [1985] 3 WLR 381, *The Aliakmon,* above) will influence the New Zealand Courts when cases in these other fields arise remains to be seen.

Improper interference with ministerial discretion. The courts should not "second guess" the merits of a policy which ought to be determined and applied by a minister or statutory body exercising statutory powers. To do so would offend against the doctrine of the separation of powers. "Operational" negligence in the carrying out of policy may, on the other hand, attract a duty. In *Takaro* the relevance of the "policy" immunity as regards the instant claim was discussed – and discounted – at first instance and also on appeal.

Invalid consideration

Quilliam J recognised that in the mind of Mr Rowling there was very much a matter of policy involved. The dominant consideration for him was the requirement that the land should revert to New Zealand ownership. This, however, was an invalid consideration and had to be ignored.

Mr Rowling also took into account a number of other factors, including the doubtful viability of the project, the unwise deployment of resources that was involved, the company's undercapitalisation and total indebtedness and the lack of clear benefit to New Zealand as a whole. These also, though, were not matters which he could properly take into consideration as relating to the need to maintain overseas resources and exchange. When they were put aside there was left nothing but a routine application which complied with the prescribed requirements. The Minister's decision was the antithesis of policy or discretion and should, therefore, be equated with it having been operational.

In the Court of Appeal the approach adopted by Quilliam J was approved. Only Woodhouse P went on to discuss the policy/operational issue. He repeated the view of Lord Wilberforce (in *Anns*) that the more a particular exercise of statutory responsibility is within the area of implementing policy rather than making it, the easier to superimpose a common law duty to be careful. These decisions did not, he thought, fall conveniently into one compartment or the other. All kinds of decisions made in the execution of policy wold still involve a considerable exercise of discretion. Again, it might not be possible on purely logical grounds to distinguish aspects of the practical development of policy from its broad formulation. Thus it would be wrong to conclude that these distinctions could have final significance in a case such as the present, nor would there be automatic exclusion of a duty simply because accent was on policy rather than operational aspects of statutory decisions. If there had been careless reliance upon an irrelevant factor the particular statutory purpose and the valid rules to be applied in achieving it would have to be carefully assessed in order to determine that issue. Certainly, however, a minister would not be relieved of a common law duty of care by reason of status alone, nor could he move outside the scope of such a duty by the mistaken process of applying extraneous policy considerations to a substantially practical and even routine decision.

Issue in interlocutory proceedings

When the duty issue was before the Court of Appeal in the interlocutory proceedings it was speculated that the exercise of the Minister's discretion could involve major policy considerations concerning the application of the relevant regulations, the level of the country's overseas reserves and the development of New Zealand. As it was thought not to be clear from the pleadings whether the Minister's decision fell into the "policy" or the "operational" category, the case was returned to the High Court in order that more evidence on the matter could be adduced.

In a subsequent comment (Aronson and Whitmore, *Public Torts and Contracts,* 1982, pp 86-91) it was asked what else it was the Court wanted to know about the reasons for the decision. They already knew what they were. Anyway, the allegation being that the Minister had a duty to give a valid decision, it was not clear how the suggested policy matters had any bearing on such a duty. Now that the case has been finally determined these comments acquire added pertinacy. The dominance of the reversion factor in Mr Rowling's thinking and the existence of a duty of care were simply confirmed after a further eight years had passed.

It is one thing to say that a Court should not pronounce upon the *merits* of a political or economic decision made in the exercise of a statutory discretion. It is quite another thing to say that care should be taken to see that the decision is made within power, for the Court does not then presume to question the policy. Looked at in this light the approach taken in *Welbridge's* case was, perhaps, unnecessarily formalist. The Court recognised a municipality at the operating level as being different in kind from the same municipality at the legislative or quasi-judicial level, yet the mechanics of valid decision-making seems to be very much an operating matter. Recognition of the duty nonetheless has far-reaching consequences. If *Takaro* is right, does every invalid administrative decision contain at least the seeds of an action in negligence? The answer possibly is yes: but the crucial issue of breach of duty has also to be determined.

Breach of Duty

It is quite clear that merely to prove that a decision was made beyond power does not in itself establish that it was made negligently. Nonetheless the members of the Court of Appeal were all agreed that Mr Rowling was indeed negligent in refusing his consent to Takaro's plans for impermissible reasons.

Mr Rowling gave evidence that he knew that he had no right to take the reversion factor into account if it stood alone but that he thought that he could do so in combination with various other factors, and these in their totality justified his refusal. Quilliam J at first instance held that these other factors were also irrelevant but considered that the Minister's honest mistake nonetheless could not be regarded as a negligent mistake. His sharing of the responsibility with other colleagues on the Cabinet Economic committee also showed that he had been careful.

On appeal Woodhouse P commented that the honest use of material known to be irrelevant involved an illogicality which hardly met the standard of care to be expected. In any event, honesty was no answer to the complaint that the Minister assumed too much too easily. A subjective belief that something could be properly be done was no answer to a claim in negligence. The standard of care had to be assessed objectively – by asking what might reasonably have been expected in the circumstances. His Honour was satisfied that neither the Minister's belief nor the reference to the Committee was enough to excuse his mistake. Taking into account his candid admission that he knew he could not allow the reversion factor to influence his decision if it stood alone, it remained his duty to ignore it.

Other members of the Court also seemed to put some weight on the Minister's "concession" if such it was. Cooke J thought that the Minister's supposition was so unusual that he should reasonably have seen it as crying out for legal advice. Somers J considered that the Minister's knowledge and belief were such as to amount to a breach of duty to take reasonable care to ascertain the extent of his powers. He ought to have taken legal advice on whether he could give any weight to the reversionary factor, in which case he would have been advised that it could not lawfully be taken into consideration. McMullin J, however, put aside the subjective view of the Minister and applied an objective test, a finding of negligence being the result.

Cooke and Somers JJ apparently saw Mr Rowling's breach of duty as arising out of his own confused state of mind and Woodhouse P thought this at least of some relevance. It is difficult to understand why this should be so. Given that the Minister acted honestly, his "concession" was surely irrelevant. Suppose he had believed that the *could* base his decision on the reversion factor alone. Or suppose he did not realise that there were any restraints on his decision making. One would think that Mr Rowling's perceptions as to the ambit of his powers, whatever they might be, could make no difference to what he might be expected to do as a reasonable

Cabinet Minister. The test for negligence is objective, as Woodhouse P and McMullin J expressly recognised.

That being so, we have to ask why should Mr Rowling have been expected to take legal advice here? His belief that he was acting within power was not, it seems, objectively unreasonable. A Professor of Public Law said about the first *Takaro* decision that legislation which, in the context of authorising the regulation and control of the banking system, apparently conferred a basic, broad and subjectively worded power to deal with overseas investment was read narrowly and restrictively, and the purposes were cramped in a way which precluded a consideration of the range of non-economic factors traditionally taken into account in overseas investment decisions: see K Keith "Administrative Powers and Purposes" (1977) 7 NZULR 264 at 269. Is this commentator also to be seen as having been negligent in reaching that conclusion?

Reserve Bank guidelines

Putting the "concession" aside, the only other special feature to the case possibly indicating negligence, and which Woodhouse P noted, was that the case fell within the published guidelines of the Reserve Bank in such a way that if the bank had processed the application the consent would have been granted as a matter of routine. It was only because the Minister had dealt with a prior application from Takaro that the second application was sent on to him. The guidelines as such would not, of course, bind the Minister. Indeed, inflexible adherence to an established policy can render a decision invalid as constituting a self-imposed fettering of a discretion: see *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610 per Lord Reid at 624. Nonetheless the guidelines were, perhaps, of some relevance in signalling a need for reasonable consistency in their application and caution in departing from their terms. This is, however, a somewhat slender thread upon which to hang a finding of negligence.

It is hard to resist the conclusion that the Minister was held to have broken his duty primarily because his opinion turned out to be wrong. Yet few would deny that determination of the question whether a decision was made intra or ultra vires may involve complex legal issues upon which minds may justifiable differ. In *Dunlop's* case the council was immune from liability because it took legal advice which subsequently was held to be incorrect, yet the council's legal advisers were specifically absolved from negligence. (Equally, it cannot be said that a Judge is negligent merely because he gives a Judgment which afterwards is reversed by a higher Court: see *Whitehouse v Jordan* [1980] 1 All ER 650 per Lord Denning MR at 658).

It is submitted that a finding of negligence ought only to be made on some objectively sound basis, such as non-compliance with a *previous* judicial decision concerning the parameters of the power in question and about which the Minister could reasonably be expected to know. As matters stand, *Takaro* invites the victim of virtually any invalid administrative decision to contemplate a negligence suit against the decision maker.

Damages

Cooke and Somers JJ both state in their Judgments that it was conceded before the Court of Appeal that if legal advice had been taken it would have been that the reversion factor could not be taken into account. It is clear, however, that Their Honours were in error on this point and that counsel for Mr Rowling in fact argued that it was entirely speculative what legal advice would have been received had it been sought. Such a concession would indeed have tended to run counter to the argument that the Minister had not in fact been negligent. The mistake is an important one: for it was in this light that the Court concluded that the Minister's refusal was a cause of any losses that could be quantified and related to his decision.

At this point in the Court below Quilliam J turned to what he described as "the real question in respect of causation", and expressed himself to be satisfied that the refusal of consent did not cause the plaintiff's loss because of the uncertainties inherent in the rescue scheme. He doubted that Takaro could have achieved and maintained a profitable operation and was confident that the Tse Consortium would have failed. The whole project must, therefore, have foundered.

In the Court of Appeal the Judge was thought to have acted upon a wrong principle. The correct approach as stated by Woodhouse P was to decide whether in the absence of negligence the plaintiff would have had a chance of success; and if so, whatever the difficulty of assessment, what was the degree of chance against outright success taking into account any relevant contingencies. He observed that the UK Courts when calculating damages under the Fatal Accidents Acts had similarly to assess the chance of future financial benefit from the deceased person. The balance of probability test had been seen as quite inappropriate in these cases.

As Quilliam J had approached the matter on a different basis he had not sought to assess the value of the opportunity to trade out of trouble which was lost to the company. Ordinarily the case would have been referred back for his further attention, but both counsel asked that the Court of Appeal itself assess the damages in order that the case should finally be brought to an end, and the Court acceded to this request. Woodhouse P in particular devoted some considerable attention to the various possible bases for the calculations that needed to be made, but ultimately all members of the Court recognised that on the very scanty evidence available the best that could be done was to reach an approximate figure, based very much on impression, which seems fair to both parties. In the result Takaro was awarded $300,000 together with interest from the date of the wrongful refusal of consent.

Abuse of public office

Finally, brief mention will be made of the tort of misfeasance by a public officer in his office or, shortly, abuse of public office. The tort is a relatively unknown one, although it was described as "well established" by Lord Diplock in *Dunlop's* case. It has recently been discussed in detail at first instance and in the UK Court of Appeal in *Bourgoin SA v Ministry of Agriculture,* above, where a possible doubt concerning the requisite state of mind of the defendant was resolved.

In *Bourgoin* the defendant had revoked the plaintiffs' licence to import frozen turkeys into the United Kingdom, purportedly to prevent the

possible spread of certain poultry diseases. The withdrawal of the licence was subsequently held by the European Court of Justice to constitute a breach of art 30 of the EEC Treaty, prohibiting quantitative restrictions on imports between member states of the EEC. The real aim of the measures taken by the defendant was to block the turkey imports for commercial and economic reasons. The plaintiffs then claimed damages from the defendant alleging, inter alia, misfeasance in public office, that the defendant had exercised its power to withdraw the licence for a purpose which it knew was contrary to art 30 and this was calculated to and did damage the plaintiffs.

On the preliminary issue whether this (and other) allegations disclosed any causes of action, it was accepted that the Minister's purpose was to protect English turkey producers and that he knew (i) that this involved a failure to perform the United Kingdom's obligations under art 30; (ii) that the revocation would damage the plaintiffs in their business; and (iii) that the protection of English producers from foreign competition was not one for the achievement of which powers were conferred on him by certain enabling legislation or regulations. The defendant argued, however, that it was an essential allegation, and one not made on the pleadings, that the Minister acted with the purpose of inflicting harm on the plaintiffs.

Mann J in the High Court was satisfied that malice towards the plaintiff and knowledge of the invalidity were alternative bases for the tort and this view was affirmed in the Court of Appeal. Oliver LJ (with whom Parker and Nourse LJJ agreed on this point) thought (at 1077) that a number of older cases which might suggest that "targeted malice" was necessary were in fact entirely conclusive.

In modern times, neither *Farrington v Thomson and Bridgland* [1959] VR 286 nor *Dunlop's* case had made the suggested distinction. It was not, moreover, a sensible one. If it was shown that the Minister's motive was to further the interests of English turkey producers by keeping out the produce of French turkey producers – an act which must necessarily injure them – it was entirely immaterial that the one purpose was dominant and the second subsidiary. If an act was done deliberately and with knowledge of its consequences, the actor could not sensibly say that he did not "intend" the consequences or the act was not "aimed" at the person who, it was known, would suffer them.

Abuse of public office was not discussed in *Takaro,* the Minister's honesty of purpose being conceded. If, however, he had known that he was acting outside his powers, the tort would then have been established. The lack of any malice directed at Takaro or Mr Rush would have been irrelevant. A wider issue also needs to be raised. If *Takaro* is right, does this old-established tort have any useful role to play in the future?

Postscript:

On 25 June 1986 the Court of Appeal granted to the Crown leave to appeal to the Privy Council. It is intended that the appeal will be heard in March 1987. The views of the Privy Council on the several matters of policy and principle involved in the identification of a duty owed to Takaro and the circumstances of its breach will be awaited with interest. Of particular moment, perhaps, will be the attitude taken by the Privy Council towards the increasingly open stance taken by the New Zealand Courts towards the recovery in negligence of pure economic loss. □

Golfing up the creek

The following story from the Toronto Newspaper The Globe and Mail *was kindly supplied by a Judge who recently visited Canada.*

As golf courses go, the Scarborough Golf and Country Club cannot reasonably be ranked with the world's most difficult. At the Royal and Ancient Golf Club at St Andrews, Scotland, players still have to contend with occasional North Sea line squalls blowing long drives well off the fairway, while enthusiasts of the game on the Falkland Islands sometimes find themselves angling shots onto the green from spits of volcanic rock hanging over churning ocean water.

No such hazards confront the 1,200 members of the Scarborough club, but they do have to deal with the rushing torrents of Highland Creek — a mere runnel in bygone days, but included by the City of Scarborough in a drainage system built over the years. The resulting influx of water swelled and quickened the creek, eroding and narrowing fairways.

Card scores rose. Balls were lost. Players' tempers flared. The club sued Scarborough, alleging that the city had not gauged the drainage system's likely effects. An Ontario Supreme Court Judge ruled the other day that the city had to pay the club $3.08 million for damage caused to the fairways.

"Players have had to alter their style of play by shortening their shots to avoid landing in the creek and have this increase their scores," Mr Justice J D Cromarty wrote in his judgment. While better players are still able to complete the course easily, he noted that others have fared less well.

This amazing new handicapping system — compensating with money when players can't handle a hazard — opens up terrific possibilities. Players could sue the groundkeeping crew for cutting grass the wrong way, or subpoena tree nurseries whose elms failed to deflect errant shots in the direction of the green. Awards might be made on the basis of sand that thwarted the ball's natural inclination to bounce. Players could even sue each other for actions or comments intended to make a putt go wide. ("Your trousers are ripped in back, Jim." "I'll see you in Court, mister.")

The result of it all, of course, will be a new style of player: 19 handicap, but pending expert legal advice and not including Acts of God. □

Books

Conference on Prospects for the Establishment of an Inter-Governmental Human Rights Commission in the South Pacific.

Lawasia Human Rights Standing Committee.

Reviewed by P T Rishworth, an Auckland practitioner.

Many lawyers will have heard of the European Commission of Human Rights. It was established in 1950 when the Council of Europe adopted the European Convention on Human Rights and Freedoms. The Commission, and the associated Court of Human Rights, hears complaints by citizens of member countries that their rights under the Convention have been infringed by their governments. Cases in the 1970s on unions and the "closed shop" principle, and on corporal punishment in the Island of Man, are two examples which received some publicity here.

What may be less known is that there is an equivalent organisation in the American continents – the Inter-American Court of Human Rights. And in Africa, a draft African Charter on Human and Peoples Rights was adopted by the Organisation of African Unity heads of state in 1981 and is presently awaiting ratification by member countries.

Impetus for the establishment of all these organisations has come from the United Nations and the post-Second World War concern for protecting human rights. As yet no similar type of organisation has been established in the Asia and Pacific region. The United Nations has, however, been active in the Asian region in an effort to promote some form of regional arrangement for the protection of human rights along the lines of the Commissions in other parts of the world.

It was against this background that the LAWASIA Human Rights Standing Committee organised a conference in Fiji in April 1985 on the topic "Prospects for the Establishment of an Inter-Governmental Human Rights Commission in the South Pacific". The committee considered that the Asian and Pacific regions comprised such diverse cultures and ethnic groups that a useful first step towards a regional human rights organisation may be the establishment of a "sub-regional" organisation for the South Pacific area.

Participants attended from most of the countries in the LAWASIA region, albeit that the specific proposal under discussion was a Human Rights Commission for the South Pacific only. Some speakers came from even further afield such as Strasbourg, France (the headquarters of the European Commission on Human Rights) and New York (headquarters of the United Nations).

The seminar occupied two and half days and the papers delivered have now been published in book form by LAWASIA. In broad terms the papers fall into three broad categories.

A Prospects for establishment

In the first category where those papers which related closely to the subject matter of the conference: What *were* the prospects for establishment for a Human Rights Commission? How would it operate? How could it be achieved? Would something less suffice? How could LAWASIA help?

A senior lawyer from the European Commission on Human Rights outlined how that commission has operated since its establishment by the Council of Europe in 1950. The Secretary-General of LAWASIA then outlined in detail how the Inter-American Court of Human Rights had come to be established, and the various steps leading to the draft African Charter on Human and Peoples Rights. A common theme in Europe, America and Africa was isolated – in each case the Human Rights Commission was grafted onto regional structures which already existed. Even with that head start, however, the gestation period for the birth of a commission can be incredibly long: in the Americas the process leading to the adoption of the American Convention on Human rights (which created the Inter-American Court of Human Rights) began in 1940 and ended, many conferences later, in 1969.

It was noted that, in contrast, the Pacific had no single major existing regional structure onto which a human rights protection "component" could be grafted. It was therefore to be expected that a similarly long, if not longer, gestation period would be required.

An Australian law professor delivered a paper which considered an alternative to a Human Rights Commission for the area. This speaker pointed out that the ratification of the various United Nations treaties on Human Rights issues imposes, apart from anything else, a substantial administrative burden for small countries. Apart from the obligation to review existing laws for compliance with the treaties, there is often a requirement for periodic reporting to United Nations Committees. The speaker proposed that a human rights "secretariate" be established which could assist *all* South Pacific island nations in discharging the obligations that they would assume if they ratified United Nations treaties. This would remove one of the impediments to ratification of these treaties and so enhance the protection of human rights in the region.

The deputy chairman of the Australian Human Rights Commission, and our own Human Rights Commissioner, the Honourable Mr Justice Wallace, each

delivered papers explaining their own statutory commissions' functions in Australia and New Zealand.

One commentator, a Fijian lawyer, raised the fundamental question "Is a human rights arrangement necessary here [in the Pacific]?". Strangely enough, this question was not explored in any depth by any of the speakers. Perhaps the commentator himself partly answered it when he went on to say:

> Much has been written concerning human rights. It is time now that these rights were implemented . . .

For, as much as one may dislike creating yet another organisation, there does not seem to be a better way of implementing human rights than to create bodies whose job it is to protect them.

B Development issues

A second broad category of papers related to what may be called "development" issues. These speakers tended to focus on the broader aspects of human rights such as the rights to food, housing and employment. At one end of the scale, Professor Weeramantry of Monash University delivered an intellectually stimulating paper in which he concluded that the United Nations Charter of Human Rights imposes a *legal* obligation on member countries to protect their citizens right to economic development. At the other end of the scale a priest outlined the housing problem in Fiji. But as one commentator put it:

> The right to work is important but its declaration within a constitution does not find work for people.

So too, it must be said, with the rights to housing and the rights to development.

In the writer's view, the papers in this second category tended to depart from the main purpose of the seminar. As Mr Justice Wallace said:

> If the concept of human rights is to have credibility, the term must be firmly linked to a clear but limited range of fundamental rights such as rights to life, liberty and work, freedom from torture and unusual punishment, freedom of speech, thought, religion and movement, freedom from discrimination, privacy and equality before the law.

The success of the European Commission has been largely due to the fact that it operates under the European Convention which is confined to these fundamentals. And on a practical level, it is difficult to conceive that Pacific Island Governments (or indeed our own) would rush to embrace a Commission that would then sit in judgment on their performance in relation to economic and development issues.

C Broader issues

The final broad category of papers was definitely tangential to the stated purpose of the seminar. Speakers in this category failed to heed the early warning of Mr P J Downey (a former co-chairman of the LAWASIA Human Rights Standing Committee) that the conference should not itself purport to be a "one-off" human rights commission and to pass judgment on particular issues. Several speakers did in fact use the conferences as a forum to highlight what they considered abuses of human rights in their own countries. Having said this, however, it must also be said that these papers are the more enduring and interesting and it is worth getting hold of the LAWASIA Seminar book just to read them.

A representative from the Kanak Socialist National Liberation Front (FLNKS) described the Kanak struggle for self determination in New Caledonia. Another participant dealt with similar issues in French Polynesia. And a Hawaiian lawyer delivered an extremely interesting paper describing the history of Hawaii and its annexation by the United States to become first a territory and later a state. As described, the process involved an invasion by US Marines in 1893 which was instigated by 18 American residents whose leader then demanded that the Hawaiian Queen either surrender or war with the United States. The Queen, to whom the invasion was a complete surprise, then signed a surrender document but expressly under protest. An annexation treaty with the United States was prepared but President Cleveland, upon hearing how it had come about, refused to send it to the Senate for ratification. Not until the advent of President McKinley in 1898 was the treaty ratified.

It was difficult to disagree with these speakers that the right of self-determination of indigenous races is indeed among the most fundamental of human rights. This would no doubt be a key issue that any regional human rights commission would have to address. Ons suspects however that the administrators of those islands where the self-determination issue is raging will not wish to join in the establishment of a commission that would then condemn them. There is also another issue which was not addressed by these speakers — what of the rights of second or third generation New Caledonians or Tahitians of French parentage to whom their birthplace is home as much as it is to the indigenous people? This is a complex problem and the LAWASIA Seminar was not, in any event, the place to address it.

At the end of the conference a series of "conclusions" was agreed, of which the two most significant were:

> (a) . . . that LAWASIA recommend to all governments in the [Pacific] region that they consider the early establishment of an inter-governmental treaty based human rights body with promotional reporting and advisory functions; and that governments that have not yet done so ratify the major human rights conventions . . .
>
> (b) . . . that LAWASIA press for administrative purposes to the South Pacific Commission or the South Pacific Forum, or other body, to initiate the setting up of the regional inter-governmental human rights body . . .

A small working party was set up to pursue these aims.

Some months after the conference, LAWASIA formally resolved that its name would henceforth be "Law Association for Asia and the *Pacific*", rather than the "Western Pacific". This was partly a reflection of the significant participation and interest in the conference expressed by representatives from nations of the Northern and Eastern Pacific, such as the Federated States of Micronesia, Hawaii and French Polynesia.

It now remains to be seen whether a South Pacific human rights commission has been conceived, and if so, how the gestation period will develop. □